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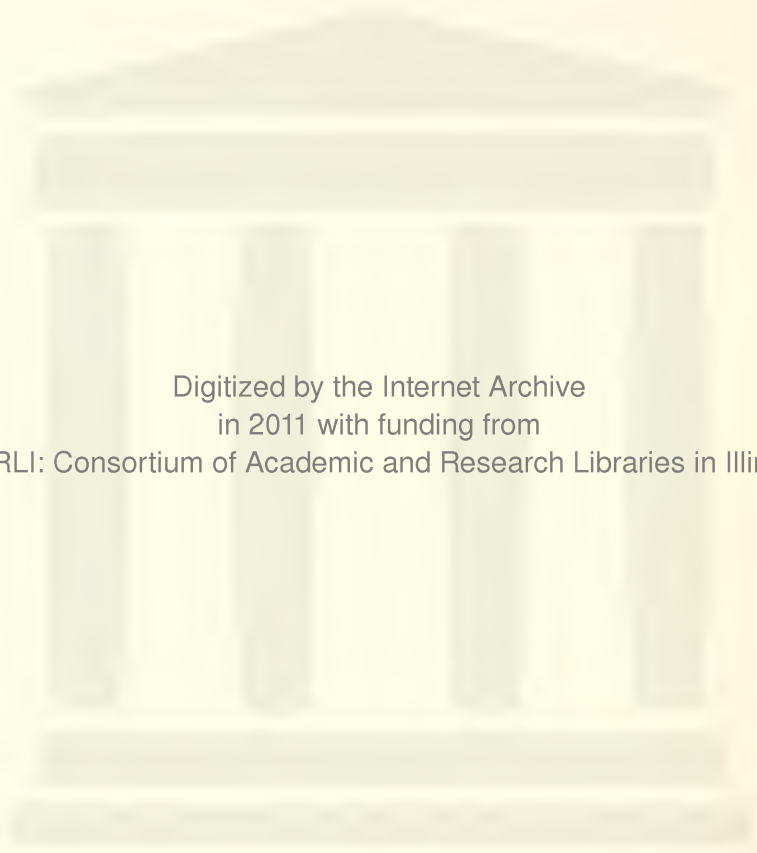
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THE LAWS OF
ILLINOIS TERRITORY
1809-1818

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COLLECTIONS OF THE ILLINOIS STATE HISTORICAL LIBRARY

VOLUME XXV

LAW SERIES VOLUME V

THE LAWS OF ILLINOIS
TERRITORY
1809-1818

EDITED WITH INTRODUCTION BY

FRANCIS S. PHILBRICK

EMERITUS PROFESSOR OF LAW, UNIVERSITY OF PENNSYLVANIA

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P R E F A C E

In the introduction to *The Laws of Indiana Territory, 1801-1809* (*Illinois Historical Collections*, 21) considerable attention was given to matters of concern primarily to lawyers: the organization of courts, the personnel of bench and bar, the character and amount of litigation, crimes and prosecutions. However, as the examination of local records in southern Illinois in preparation for that volume was made possible by aid from the State Historical Library, and not by aid from lawyers, most of the introduction to it was devoted to matters in which general historians would be primarily interested: to the laws illustrating social conditions, to economic controls, taxation, the land frauds, the character of local and territorial administration, the controversies over division of the territory and over transition from the first to the second stage of territorial government, and information concerning the individuals who were prominent in the early judicial and administrative records of Illinois.

The introduction to *Pope's Digest, 1815* (*Illinois Historical Collections*, 28, 30) was devoted exclusively to matters in which lawyers alone have special interest, save in so far as some light was incidentally thrown on the activities of a few lawyers who were important actors in the political life of the Territory and State up to 1830.

In these earlier volumes virtually nothing was said of the basic public law of the early territorial system. To that topic the introduction to the present volume is almost exclusively devoted—all of it, in fact, except the first section. The writer has not been without warning, both from print and from friends, that perhaps too much has already been written of the general subject—which at basis is the Ordinance of 1787—considered in the other four sections. The writer shared that feeling as respected portions of the subject; yet even in the case of these he hopes that sufficient justification is shown for their renewed examination. Reference is here made, particularly, to the topics of the Ordinance's authorship and its antislavery compact. Discussions of the former have presented amazing examples of a willingness on the part of professional historians (including two presidents of the American Historical Association) to substitute fantasy for evidence; and they also illustrate the deterrent influence of such writing upon the independent judgment of younger writers. As for the antislavery

article of the Ordinance, false conceptions of that instrument's nature, and particularly of its "compact articles" are still embedded in all but a minimal part of the books in which students would put unquestioning confidence, and an uncritical reading of documents has led to confusion even as respects the purpose of Article VI.

The writer's general attitude toward the Ordinance, and his judgments respecting the impediments to successful administration which its omissions and obscurities presented, were formed tentatively and in a general way when engaged in the work on volume 21 of these *Collections*, twenty years ago. Later reading and reflection have only confirmed them.

The present volume should have appeared at least fifteen years ago. The Jefferson Papers and other collections in the Library of Congress had been searched even before then. By the kindness of Dr. Clarence Edwin Carter, the documents collected by him for five or six of the early territories were examined before publication began of the *Territorial Papers* under his superb editorship. And in the early 1930's I received every aid and courtesy from Miss Margaret C. Norton in examining papers in the Archives Division of the Illinois State Library. So far as any documents then examined in these or other repositories have since been published in the *Territorial Papers* they are cited, for the reader's convenience, as therein published. It is in some ways well that circumstances prevented for many years the actual appearance of this volume. Little of the immense mass of data remained in the writer's mind when work was resumed; a complete re-examination of all notes and of much of the original sources was a necessity; and this retracing of every step has altered opinions on some points and revealed many additional connections between events. It has also clarified the writer's views on countless matters.

Particular acknowledgments are due to the Social Science Research Council for a grant-in-aid for the summer of 1948, and to Mr. J. Monaghan, in charge of the Illinois State Historical Library, for an appointment on the staff of the Library for the same period. The text of the laws as here printed has been prepared entirely by the Library. Though cordially acknowledging many courtesies shown me by other members of the staff, I am particularly indebted to Mrs. F. A. Whitney, Mr. Howard Rissler, and Mr. S. A. Wetherbee for the immense services of putting my manuscript into proper form and of seeing it through the press. For the accuracy of citations, however, I am myself alone responsible.

FRANCIS S. PHILBRICK

INTRODUCTION

SECTION I

THE TERRITORIAL STATUTES OF 1809-1818

I

Few of the statutes in this volume are individually of any particular interest. There are only thirty-four¹ of the period of government of the first stage. The general characteristics of these in relation to the law of the territories of which Illinois was a part before it became a separate territory are discussed in the last section of the present introduction.² The great importance is there emphasized of the fact that the laws of the Northwest Territory continued in force as the basic statutory system in each of the territories therefrom developed, except as gradually modified by their independent legislation; and of the further fact that the same was true of the statutes of each of those territories in relation to others carved out of it.³ Thus the laws of Indiana Territory, including the notable revision of 1807 (which embodied much of the laws of the Northwest Territory),⁴ and of the Northwest Territory so far as not modified or superseded by Indiana legislation, were recognized as the basic law of Illinois Territory in 1809⁵ and again in 1812.⁶ Thanks to this continuity of legislation from the Northwest Territory into and through other territories throughout the Old Northwest and much of the upper Mississippi Valley, each territory was free to enjoy from the outset a great body of law originally selected and sometimes several times revised to suit frontier conditions. The process has been discussed in the introduc-

¹ See *post* nn. 113, 164 of Sec. V.

² *Post* ccccxviii *seq.*

³ *Post* ccccxviii-viii. However, Michigan in 1810 renounced her heritage. See *post* at notecalls 161-63 of Sec. V and W. W. Blume, ed., *Transactions of the Supreme Court of the Territory of Michigan, 1805-1836* (6 vol. 1935-1940), 1: xxxix-xl.

⁴ F. S. Philbrick, *The Laws of Indiana Territory, 1801-1809* (*Illinois Historical Collections*, 21), cii-ciii, civ-cvi; *Pope's Digest, 1815* (I. H. C. 28), 1: xvii-xviii, xxxiii.

⁵ *Post* 5.

⁶ *Post* 51.

tion to *The Laws of Indiana Territory*, and is more fully examined in the last section of the present introduction.⁷ The relation of the laws in this volume to the revision of 1815, and through it to the permanent statutory law of Illinois, was discussed in the introduction to *Pope's Digest, 1815*.⁸ Almost all the laws in the present volume are mere slight supplements to the earlier legislation. This is the reason why so few of them merit individual discussion.

There are, however, a few laws relating to the General Court that call for very particular discussion. Before passing to their consideration the contents of the volume may be considered in a general way, especially the laws on courts. The purpose of this is to make clear in outline the older judicial system and particularly to consider its defects, in order better to understand the purpose of the territorial legislature, and the precedents on which it acted.

II

Of laws passed by the legislature under the second or representative stage of government there is a total of one hundred and eighty-seven.⁹ Of these, there are eighteen (in addition to two from the earlier first stage of government¹⁰) which reflect the still distinctly frontier conditions of the Territory;¹¹ a discussion of these would add nothing to that of similar statutes passed while it was a part of Indiana Territory, and discussed in an earlier volume.¹² On the other hand, the place in the state's legislative development of twelve laws which

⁷ *Post* ccccxviii *seq.* and Philbrick, *Laws of Indiana Territory* (I. H. C. 21), as in n. 4 *ante*.

⁸ Philbrick, *Pope's Digest, 1815* (I.H.C. 28), 1: xv-xviii.

⁹ Only 186 if the suggestion be accepted that the first "law" of 1812 is only in form such, being in substance, like the first "law" of 1809, not an order as to what *shall be* law but a formal recital (merely more formal than the resolution of 1809) of what the legislators regarded as existing fact—see *post* n. 164 of Sec. V.

¹⁰ One to provide for the guarding of jails!—*post* 18; see Philbrick, *Laws of Indiana Territory* (I.H.C. 21), clxxxi-clxxxii. The other was to suppress dueling—*post* 36. One of the acts for relief of individuals cited in n. 33 below was for persons who had violated the law against dueling—*post* 187; see *ibid.* 372-73. xciv n. 2, ccliv.

¹¹ Namely, 3 on wolves—*post* 159, 191, 233; 3 on Indians—*post* 89, 154, 177; 6 on ferries—*post* 71, 158, 187, 205, 283, 303; 2 on bridges—*post* 310, 326; 2 on grist mills—*post* 64, 292; 1 on mill dams—*post* 301; 1 on salt-peter caves—*post* 302.

¹² Philbrick, *Laws of Indiana Territory* (I.H.C. 21), at cxxii-cxxiv.

INTRODUCTION

mark the oncoming of new social conditions¹³ can best be appreciated by considering them in connection with the disappearances and first appearances of topical headings in successive revised statutes of the state; and these have also been discussed in the introduction to another earlier volume of these *Collections*.¹⁴

To these indicia of a passing and of a coming society may be added a reference to the two statutes on Negroes and mulattoes.¹⁵ It became clear a few years later that they belonged to the past. These statutes are a trifling appendage to the legislation of the Indiana Territory on the same topics, and that legislation has also been fully discussed in an earlier volume.¹⁶

Another large division of these early laws is that dealing with territorial government. The most important sub-group of these is that relating to the collection of revenue.¹⁷ It was manifestly still a difficult problem, as it was in the period of the Indiana Territory,¹⁸ one illustration of which is found in the statutes passed to cure irregularities of sheriffs, treasurers, commissioners, and county courts in their procedure under the tax laws.¹⁹ Two other large sub-groups are constituted of acts dividing or altering the boundaries of old counties or creating new ones²⁰ and of provisions relating to the militia. The former have no general significance beyond indicating the rapid growth of population. The militia laws were failures, as they had

¹³ Namely, 1 on public warehouses—*post* 251; 1 declaring a stream navigable—*post* 312; 2 on a territorial census—*post* 315, 317; 1 granting a divorce—*post* 309; and 7 incorporating banks, navigation companies, and medical societies—*post* 239, 284, 297, 327, 334, 340, 348.

¹⁴ Philbrick, *Pope's Digest, 1815 (I.H.C. 28)*, 1: xxi, lxix-lxxiv. Topical headings first appeared in this *Digest* of 1815. Some old subjects of legislation had disappeared by that date, others were gone from the *Code* of 1827-1829. The changes from 1827-1845 are discussed in the pages cited.

¹⁵ *Post* 97, 157.

¹⁶ Philbrick, *Laws of Indiana Territory (I.H.C. 21)*, xxxvii, xlviii, cxxxiv-cxliii.

¹⁷ Sixteen laws—9 on the land tax, *post* 59, 114, 130, 175, 212, 265, 267, 297, 314; 7 (2 of these applicable likewise to land) on other property or sources of revenue—*post* 77, 89, 114, 158, 204, 211, 267. Five acts dealing with the collection of *unpaid* taxes (not prescribing a normal and future mode of collection) are included in those cited *post* in n. 19, but are not included in the 16 here in question.

¹⁸ Philbrick, *Laws of Indiana Territory (I.H.C. 21)*, cxv-cxx.

¹⁹ See the following 8 laws—*post* 51, 85, 113, 193, 198, 234, 265, 322. To these laws are to be added 2 more from the first stage of government—*post* 11, 18.

²⁰ Fourteen laws.

been during the Indiana period.²¹ Indeed, they were probably everywhere failures. Commissions were social distinctions, and to confer them so as to give satisfaction and at the same time make the militia an effective military body seems to have been in every territory a problem exceedingly difficult to handle.²² The other statutes in this division of governmental provisions dealt with the bare essentials of administration.²³

Not, indeed, equal in number to all the statutes already mentioned,²⁴ but more than two-thirds as numerous, were those dealing with the administration of justice. These include laws regulating the various courts from those of justices of the peace to the highest tribunal of the Territory²⁵—to which some attention will be given below; fixing the seats of justice;²⁶ dealing with clerks, sheriffs, circuit attorneys and attorneys, and with grand and petit juries;²⁷ a notably large number dealing with practice and fees²⁸—to which we may join one “to compel the citizens of this territory to afford legal assistance to certain officers” (to wit: “any Judge, Justice of the peace Sheriff Coroner or Constable”) “in the due execution of their offices”;²⁹ a group modifying the law under a miscellany of heads;³⁰ a few on

²¹ There were 10 of these laws. See Philbrick, *Laws of Indiana Territory* (I.H.C. 21), cxxii-cxxiii.

²² Perhaps most so in Mississippi. Compare C. E. Carter, ed., *The Territorial Papers of the United States* (1934—), 5: 74-75, 530, 562-67, 570-71, 576-77, 604-7, 728; 6: 33, 317.

²³ With oaths of office (2 laws), salaries and fees (6 laws) of non-judicial county or territorial officials, with elections (3—*post* 70, 93, 118), qualifications and allotment of representatives in General Assembly (2), provisions for county government (4—*post* 67, 144, 172, 303).

²⁴ Namely, omitting duplications, 99.

²⁵ There are 27 such laws: 8 (*post* 52, 75, 78, 98, 136, 160, 207, 263) dealing with the highest court of the Territory; 5 (*post* 203, 207, 256, 324, 355) with circuit courts; 3 (*post* 57, 86, 90) with the old Common Pleas; 4 (*post* 149, 169, 199, 264) with the County Courts that followed the Common Pleas; 2 (*post* 206, 324) with Courts for Small Causes; and 5 (*post* 94, 161, 270, 283, 355) with Justices of the Peace.

²⁶ There were 6 such laws; changes were made necessary by the laws cited *ante* at notecall 20.

²⁷ There were 6 laws (*post* 55, sec. 19; 156, 205, 221, 224, 275) on the duties of clerks; 3 (*post* 221, 266, 324) on district and circuit attorneys; 2 (*post* 66, 192) on juries; and 1 (*post* 238) excluding Indiana attorneys from practicing in Illinois.

²⁸ Sixteen on practice and procedure, including acts on abatement, certiorari, executions, and indictments—*post* 52, two; 73, 86, 94, 131, 135, 150, 157, 171, 188, 217, 246, 250, 253, 305—and five on judicial fees.

²⁹ *Post* 211.

³⁰ On fraud (1—*post* 65), crimes (2—*post* 77, 225), bankruptcy (1—*post* 250), intestacy (2—*post* 110 and *see* 275), fines and forfeitures (2), estrays (1), and the effect of repealing a repealing statute (1—*post* 191).

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records,³¹ and a few others on the revision and printing of the laws;³² and a small number of private acts for the relief of individuals.³³

The very small number of statutes passed to modify the substantive law, in proportion to those relating to the courts, their auxiliary officers, practice and procedure—approximately one to five—shows very well that there was general satisfaction with the law but great dissatisfaction with the machinery for administering it. Justification for dissatisfaction with both the law and its administration was almost certainly greatest in the early years of the Northwest Territory, and lessened as time passed. On the other hand, tinkering with the judicial system, evidencing dissatisfaction with it, steadily increased. This was certainly not because the service it rendered deteriorated;—far from it. It was because appreciation of the courts was growing, because more was expected of them, and because certain *changes* in them which territorial opinion looked upon as *betterments* could not be thoroughly effected without altering fundamentally the whole judicial system set up by the Ordinance. Many things marked a tendency in that direction over a score of years. The change came to a climax in the Illinois statutes which will be particularly considered. A review of their antecedents will make clear to non-lawyers the significance of those statutes.

III

The Ordinance provided for the whole of the Old Northwest a single General Court of three judges. True, there was no population in great portions of this region and so no need for law; but there was need for courts in various scattered settlements over an area about nine hundred by three hundred miles.³⁴ In some way the three judges were expected to supply the needs of this area for regularly administered justice. It seems evident that it was the physical circumstances of the Territory which compelled the Court to be ambulant when

³¹ Namely, 3; none was a recording act, two relating to "ancient records and papers," the other to the records of the federal land commissioners.

³² Also 3.

³³ In all 6 (not including any cited in n. 19 but including one on divorce already mentioned). The laws mentioned in nn. 25-30, after deducting duplication, total 74. Six laws included in the 99 of n. 24 are also included in the preceding total of 74.

³⁴ This is conservative. In 1800 a committee of Congress stated the distance between the two places "of holding courts" which were most remote from each other as 1300 miles—*American State Papers, Miscellaneous*, 1: 206.

sitting in bank; and in 1795, when a seat of justice was for the first time fixed for such sessions, two were fixed—at Marietta and Cincinnati—for the better accommodation of the rapidly increasing population in those two extremes of the Territory in Ohio.³⁵

Whether or not Congress intended that the Court's original jurisdiction should be exercised not at a fixed seat but on circuit cannot, of course, be said. It is, indeed, very unlikely that more than a very few members gave thought to the matter. But in the first and fundamental act of the governor and judges relating to the Court it was provided that it should hold pleas four times yearly "in such counties as the judges . . . deem most conducive to the general good Provided, however, that but one term be holden in any one county in a year; and that all processces . . . be returnable to said court wheresoever they may be in said territory."³⁶ This was a natural interpretation of the Ordinance for Governor St. Clair, since the same practice was followed in Pennsylvania under the law from which the territorial statute was adopted.³⁷

The Ordinance conferred upon the Court "a common law jurisdiction,"³⁸ but it said nothing whatever as to how the jurisdiction should be exercised, so that the *Court* was undoubtedly free to exercise its discretion in the manner stated. But the territorial legislature, though it consisted of "the governor, and the judges or a majority of them,"³⁹ was nevertheless not to be confused with the Court. It would have been possible for the Court to regulate its sittings and other affairs, but most extraordinary. Regulation should properly have been made by Congress, which only by re-enactment of the Ordinance in 1789 gave vitality to it under the new Union. Its failure to act in this respect, under the unrestricted power over the territories conferred upon it by the Constitution, is only one detail illustrating the confusion which prevailed in 1789 respecting the legal bases of territorial government. In the last section of this introduction the sur-

³⁵ T. C. Pease, *The Laws of the Northwest Territory, 1788-1800* (I.H.C. 17), 156. The Supreme Court of Pennsylvania sits alternately today at Philadelphia and Pittsburgh.

³⁶ Act of Aug. 30, 1788—*ibid.* 11. An act of Nov. 4, 1790 required a session yearly—*ibid.* 35.

³⁷ Act of May 22, 1722—*Stat. at Large of Pa.*, 3: 302-3.

³⁸ Carter, *Territorial Papers*, 2: 41.

³⁹ *Ibid.* 42. This was the true reading of the Ordinance in the journal of Congress; on the reading in the printed copies that were before the territorial officials see *ibid.* in 14 and *post* cccclvi seq.

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render of powers by Congress to the executive department is discussed.⁴⁰ The point here in question involves surrender of power to the territorial legislature. That body could not, of course, legally *alter* any provisions actually made by Congress relating to the Court. It also seems quite clear that *mere repetitions* in territorial statutes of congressional regulations were necessarily quite without legal effect.⁴¹ That is to say, unless and until Congress authorized the legislature to regulate the Court consistently with the Ordinance and other acts of Congress. Almost a year passed between the enactment of the original Ordinance and the reunion of the Governor and judges in the Territory; much of it was passed by St. Clair in Philadelphia. Another year passed before the re-enactment of the Ordinance by the new Congress.⁴² It seems almost inconceivable that questions such as those adverted to above could have been overlooked by a man of the Governor's great ability until he went to the Territory. Yet, in the year preceding that date, he and Congress were so engrossed in dangers of Indian uprisings⁴³ that possibly nobody gave thought to the most fundamental problems of territorial administration.

All that one can know is, that a year before the re-enactment (and St. Clair is possibly the one who first saw the necessity of that⁴⁴) the territorial legislature had of necessity begun to pass laws as though Congress had given it the authorization stated. "The general court for the territory . . . shall hold pleas, civil and criminal, at four certain . . . terms . . . every year"—at places stated—but only once yearly in one county—and (a most extraordinary limitation, though a mere recital of basic common law) "provided . . . That all issues of fact shall be tried in the county where the cause of action shall have arisen."⁴⁵ All this and more in the first law on the General Court, passed a few weeks after the Governor and first judges had gotten together. By 1795 these imperatives had long gone unchallenged, and

⁴⁰ *Post* cccxc-xciii.

⁴¹ Of course the same was true of provisions in the Ordinance that were duplicated (or covered) by provisions of the Constitution—*post* ccxx.

⁴² Enactment, July 13, 1787; reunion in the Territory, between July 9 and 15, 1788—Carter, *Territorial Papers*, 3: 263; re-enactment of the Ordinance, Aug. 7, 1789—*ibid.* 2: 203.

⁴³ See the first fifty pages of the second volume of W. H. Smith, ed., *The St. Clair Papers* (2 vol. 1882).

⁴⁴ Compare *ibid.* 416 and Carter, *Territorial Papers*, 2: 205.

⁴⁵ Law of Aug. 30, 1788—T. C. Pease, *Laws of the Northwest Territory* (I.H.C. 17), 11.

possibly a second and far greater limitation on the Court's jurisdiction was decreed.⁴⁶ It was only by chance that in one section there was merely a recitation: "The judges of the general court *have* power . . . to deliver the jails," but that was in time discovered and altered to read: "*shall* have power."⁴⁷ And actual restrictions on the Court's power continued to increase in number, as will later be shown.

Another, though less obscure, problem was raised by the legislature's action. By two laws—one of earlier date than, and one of the same date as, the first law on the General Court, but both acted on in advance of that—Governor St. Clair and the judges created three *local* courts—of civil jurisdiction (common pleas), of criminal jurisdiction (quarter sessions of the peace), and of probate. The Ordinance did not say that the General Court should alone exercise the jurisdiction conferred on it. Can it be fairly assumed that it was within the intent of Congress that the territorial legislature should create other courts to share that jurisdiction, subject to its supreme control? This does not seem to be an unfair assumption. In virtually all the colonies from which came the ten men who shared, in committee, in framing the Ordinance, the highest court was both an appellate court and a court of first instance with general jurisdiction at law.⁴⁸ However, here as on almost every other fundamental question, the Ordinance's brevity or obscurity leaves one to speculation.⁴⁹

The probate court will be referred to below. The county courts of common pleas were given a broad civil jurisdiction; namely, to "hear and determine all pleas, actions, suits, and causes of a civil nature, real, personal, and mixed."⁵⁰ The courts of general quarter sessions of the peace were empowered "to hear, determine and sentence . . . all crimes . . . the punishment whereof [did] not extend to

⁴⁶ *Post* xxxix-xl.

⁴⁷ This was in the law of 1795, sec. 12—*ibid.* 158; unchanged until the Indiana revision of 1807, when "shall" was introduced—laws of Jan. 23, 1801 and Sept. 17, 1807, in Philbrick, *Laws of Indiana Territory* (I.H.C. 21), 12, 232.

⁴⁸ They are named *post* n. 319 of Sec. IV. They came from Virginia, Connecticut, New York, Massachusetts, South Carolina, and Pennsylvania. Of these states Pennsylvania and South Carolina had supreme courts that functioned primarily under the *nisi prius* system. But it was a hybrid system, like that described *post* following notecall 83. See R. Pound, *Organization of Courts* (1940), 67-72, 80-85, 116.

⁴⁹ The last section of this introduction is devoted to a commentary on various points illustrating the truth of this statement.

⁵⁰ T. C. Pease, *Laws of the Northwest Territory* (I.H.C. 17), 7.

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life, limb, imprisonment for more than one year, or forfeiture of goods and chattels, or lands and tenements to the . . . territory." Any person suspected of a crime not triable in the quarter sessions was held in jail or under recognizance for trial, and the recognizance was required to be certified "before the general court of the territory at their next succeeding term, or before a court of oyer and terminer and gaol delivery for the county," if the latter held "next after the taking thereof." Unfortunately even the courts of oyer and terminer were infrequent, and a speedy trial at home was rarely possible.⁵¹

To the system of local courts organized in 1788 an orphans' court was added in 1795⁵² when the whole system was revised.⁵³ All of these courts were taken over into the Indiana system with revisions by a law of 1801,⁵⁴ and all were abolished in 1805 when their powers were merged in a single court of common pleas.⁵⁵ To their internal constitution and their relation to the General Court the legislatures of Indiana and Illinois territories gave a constant and attentive scrutiny, which culminated in an act of the latter territory of 1814. All this general account of the territorial judicial system is a necessary preliminary to an understanding of that act and its consequences.

If the General Court created by the Ordinance had alone existed it must have exercised its jurisdiction either by sitting in bank in different parts of the Territory successively or by means of a *nisi prius* system. The size of the Territory, the hardships of travel, and the gross inattention of the judges to their duties made the first alternative impossible. The legislation of the governor and judges implied a *nisi prius* system. But how nearly it approached English models cannot be known until the original records of the Court are published or carefully studied. The immediate creation of independent local courts made probable the early development of an appellate system,

⁵¹ *Ibid.* 5. The courts of oyer and terminer were held, when judged necessary by the governor, under special commission from him, if a judge could be induced to go to the county. The law on the General Court provided that "in case neither of the judges shall attend at the time and place aforesaid" the sheriff should "adjourn the court from day to day . . . ; and then to the next term." And all process could be continued indefinitely—*ibid.* 11.

⁵² Act of June 16, 1795—*ibid.* 181. An appeal was allowed "to the General or circuit courts"—*ibid.* 186.

⁵³ Act of June 6, 1795—*ibid.* 154.

⁵⁴ Act of Jan. 23, 1801—Philbrick, *Laws of Indiana Territory* (I.H.C. 21), 8.

⁵⁵ Act of Aug. 24, 1805—*ibid.* 116, 117; act of Sept. 17, 1807 (revision of 1807)—*ibid.* 225.

in accord with general tendencies in the colonies, and that probability soon became a reality.

These local courts were of and in the community, and it was they, in particular, which brought justice home to the people.

The original common law jurisdiction, civil and criminal, of the General Court being unlimited by the Ordinance, and coextensive with the Territory, civil actions could be begun or prosecutions for crime initiated in it wherever it might be in the Territory. Because suitors could not be expected to go hundreds of miles to file suit, the Court was ambulant for their convenience. Having no fixed seat, even in Ohio, there could not be in law any difference between an ambulant General Court at Marietta or Cincinnati and one "on circuit" in some more western county deemed (under the law of 1788) to need it, or in which (under the law of 1790 requiring a term in every county) it sat as of course. It was everywhere, and equally, a General Court. It seems evident, however, that a disposition existed to think of "the ordinary General Court" as essentially different from the General Court on circuit; and in the end this attitude led to their being *made* different. The *functions* of the Court in the two situations *were* to a degree different. From the fact that issues of fact must be tried in the vicinage where a cause of action arose or a crime was committed there necessarily resulted a differentiation in the functions of the judges of the General Court "on circuit" and, as they no doubt thought, "at home."

The General Court and the local courts had a civil jurisdiction that was unqualifiedly concurrent, and a criminal jurisdiction that was concurrent except for reservation to the General Court of an exclusive original jurisdiction of capital felonies. The jurisdiction of that Court being, however, in all cases superior—because created by Congress—any civil suit or criminal proceeding begun in a local court could, before trial, be removed to "the General Court" by a writ of habeas corpus or of certiorari.⁵⁶ Now, (1) it appears evident that only rarely would such a writ be issued from a General Court (say in Ohio) when the facts would be triable in a distant county (say

⁵⁶ Mr. Blume has pointed out that until 1795 the Court issued such writs under its common law powers, although their employment was incidentally assumed in the statutes (as, for example, in provisions for fees)—W. W. Blume, *Supreme Court of Michigan Territory*, 5: xi. Their employment was explicitly provided for in 1795—T. C. Pease *Laws of the Northwest Territory* (I.H.C. 17), 156.

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in Illinois).⁵⁷ But if so issued, the facts would be tried in that county before such judges of the Court as should next sit therein on circuit (or under special commission as a court of oyer and terminer); after which, the findings being certified to the Court whence the precept for trial of the issues of fact had issued, questions of law would then be argued before it, and the judgment entered in that Court. Far more likely, (2) would be removal from a local court to a General Court which happened to sit in the appropriate county when a suit or prosecution was awaiting trial, in which situation all issues would be tried by it and judgment entered. And equally probable, (3) and quite the same in result would be the case of a suit or prosecution *begun* in a General Court sitting on circuit (or as a court of oyer and terminer) in the appropriate county.

So long as the courts, civil and criminal, held in the particular counties by judges of the General Court were truly merely sessions of the General Court, it is manifest that no writ of error could issue to the Court on circuit. It is readily conceivable, however, that a motion might be made for a new trial before the Court in bank.⁵⁸ What was actually done can be known, if ever, only after publication of the Court's original record.⁵⁹ In the single case mentioned in Governor

⁵⁷ It has been pointed out that this was required by the statutes of the Territory in both civil and criminal cases—*ante* at notecall 45, and again as to criminal cases at notecall 51. There certainly were cases of witnesses who were residents in Illinois who had to testify in cases tried in Vincennes (the merchants and leading citizens of each place were much at home in both) or possibly farther east, as Jesse Thomas represented in 1808 in a report to the House of Representatives. But the statement, in a memorial from Illinois in 1805, that "a considerable proportion of the inhabitants of the Illinois are obliged, several times a year, to travel as officers, *as jurors*, as witnesses, as suitors in the National Court holden at Vincennes" over the wilderness between Vincennes and Kaskaskia (*italics added*) must be dismissed as colossal exaggeration in general and as irreconcilable with the law as regards jurors. See Philbrick, *Laws of Indiana Territory* (I.H.C. 21), clvi n. 2.

⁵⁸ However, before which court that motion would have been made would have depended on whether English practice was observed or whether colonial practice had reached the modern American form. I should suppose, in the "home" Court in bank. And as respects motions in arrest of judgment and for judgment *non obstante veredicto*—the Court on circuit being truly the General Court—I should suppose those would have been made to the judge or judges on circuit. Such details can only be ascertained from records. Dean Pound's account of appellate procedure suggests general conformity in the late 1700's to English practice—R. Pound, *Appellate Procedure in Civil Cases* (1941), ch. 3.

⁵⁹ It exists, but my examination of it years ago was not only hurried but made with none of the matters in mind which are here under discussion—Philbrick, *Laws of Indiana Territory* (I.H.C. 21), cv n. 1.

St. Clair's correspondence which involves these problems, the procedure adopted was inconsistent with the writer's view that a decision by a General Court on circuit could not be brought by writ of error before another General Court for review.⁶⁰

It is clear that the local courts were bound to gain prestige at the expense of the General Court unless the confidence of the people in the outlying counties of the Territory could be held through the work of the territorial judges on circuit and in the courts of oyer and terminer.

Unfortunately, the judges of the Northwest Territory (like the governor⁶¹) were so often absent from the Territory as virtually to paralyze both the legislative and judicial branches of government. Even when not absent, the expense⁶² and discomforts of trips of hundreds of miles, and difficulties of securing the escorts which at least some deemed necessary, made sessions of the Court on circuit extremely rare. Since the Ordinance required the presence of at least two judges to hold a General Court, this was another great difficulty until 1792,

⁶⁰ Judge Turner held a General Court in the Illinois Country early in 1795, and was guilty of improprieties for which the Attorney General declared him subject to impeachment—*post* n. 68. On June 3, 1795 Governor St. Clair wrote to William St. Clair at Cahokia (clerk of the common pleas of St. Clair County) that the proceedings must be "set aside," since the Court, under the statute, should have been held in June, "and this was held in February, and March or April," and so no court. Suggesting as one way to this end, a petition to Congress (which in fact became the basis of the Attorney General's opinion), he then added that under certain conditions Judge Symmes would be in Illinois that summer "and hold the court as it ought to be held"—W. H. Smith, *St. Clair Papers*, 2: 373-74. In a later official report to the Secretary of State he wrote: "The case involving the goods that had been seized on the Wabash was dismissed by Judge Symmes and the goods restored;"—this, presumably, then, at Vincennes, and a suit pending there—"and in the case of that against those that were seized on the Ohio and sent to Kaskaskia, and there condemned and sold, a writ of error has been brought, and the condemnation will probably be reversed"—*ibid.* 397; Carter, *Territorial Papers*, 2: 544. Doubtless Judge Symmes issued the writ of error—he and Turner had joined earlier in 1795 in passing a law that gave him that power—T. C. Pease, *Laws of the Northwest Territory* (*I.H.C.* 17), 156. The same law makes it certain that the writ was returnable to a General Court in Ohio that autumn. It would seem that a motion for a new trial was not made before the General Court in bank. On American departure from English practice as respects writs of error see R. Pound, *Appellate Proceedings in Civil Cases*, 88-94.

⁶¹ See *post* cccxvi-vii.

⁶² By the law of 1795 the Territory assumed these expenses—T. C. Pease, *Laws of the Northwest Territory* (*I.H.C.* 17), 158. Judges Symmes and Turner were reimbursed by Congress in 1792 for some expenses incurred "to go the Circuit" in 1790—Carter, *Territorial Papers*, 2: 395.

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when Congress amended the Ordinance by providing "that any one of the supreme or superior Judges of the said territories [northwest and southwest of the Ohio], in the absence of the other Judges, . . . hereby is authorized to hold a court."⁶³ But this did not cure the evil. The President and the Secretary of State chafed under these (and other) official delinquencies, and despite hesitancies arising from regard for the independence of the judiciary did what they could to correct them.⁶⁴ Portions of the older territories went for years with-

⁶³ Act of May 8, 1792—Carter, *Territorial Papers*, 2: 396. Note the word "superior," which may or may not have been used with the county courts in mind—or only the circuit courts.

⁶⁴ It is worth while to show clearly the hesitancy with which the executive department dealt with the territorial judges. If Congress had held fast to its absolute control of the territories (*post* cccxc-ii). No difficulty could have existed. Of the judges of the Northwest Territory Judge George Turner gave most concern to President Washington and the Secretary of State. In a letter of Nov. 9, 1792 Jefferson informed him that he was charged by the President to call to his attention the need of territorial legislation, which was made impossible by the absence of some legislators; "not doubting" that the public need would be put above personal considerations—Carter, *Territorial Papers*, 2: 416. On Feb. 7, 1793 Secretary Sargent wrote to the Secretary of State of "the public embarrassments, and injury" to the Territory which resulted from the absence of the judges, Judge Putnam having long been in the East, and Judge Symmes having also left it, "thereby virtually effecting a total abdication upon the Supreme Bench of this Territory,"—*ibid* 3: 407. On Feb. 26 the President's secretary informed Jefferson that the President desired to know whether Turner had gone to the Territory; and, if not, that he should "be pressed to go immediately"—*ibid*. 2: 442. On March 10 Washington inquired of Jefferson whether Turner had left; if not, he desired the Secretary's opinion as to whether the President's interference was necessary, "as well as the authority under which the President may exercise it." He regarded the long absence of Governor St. Clair and "some of the Judges" as "encouraging a spirit of riot and disorder, by relaxing the energy of the laws"—*ibid*. 2: 443. The reply of the Secretary of State, March 12, was that Judge Turner was still in Philadelphia—National Archives: State Department, Miscellaneous Letters. Still only mild measures were resorted to. On March 30 Jefferson sent Turner the letter of Secretary Sargent, "not doubting" that he would duly respond to the urgent call for his presence—*ibid*. 2: 449. On April 5 the President expressed the "surprise and mortification" caused him by the Judge's conduct; if he should still have made no preparations for leaving, the President desired Jefferson to express to him, in the President's name, "as far as my powers will authorise you to do, that I can no longer submit to such abuses of public trust without instituting (if I have powers to set it on foot) an enquiry into his conduct"—Carter, *ibid*. 2: 450. Finally, on April 17, Jefferson wrote to Turner that the President considered it necessary "that some legal inquiry" should be made into the absence from the Territory of its judicial and legislative officers, and had charged Jefferson to inform the Judge that the Attorney General had been "instructed to consider and to do what may be proper on the occasion"—*ibid*. 2: 452.

There is also in the Jefferson Papers (Library of Congress) a memorandum from Attorney General Randolph to the Secretary of State con-

out circuit courts or jail deliveries.⁶⁵ Acting Governor Sargent, complaining to the Secretary of State in 1797 of the absence of two judges to hold a Court, wrote: "the Term passes off in many Counties without avail for the want thereof . . . and I know nothing that can have

cerning Judge Turner (v. 80, fol. 13910) which is dated "1792 (?)". This was, perhaps more likely, of April 1793. It advised that Governor St. Clair be instructed: (1) to transmit to Judge Turner whatever "authoritative intelligence . . . concerning the complaints of the people against his absence" was in his possession; if none, then (2) "to represent to Judge Turner, without undertaking to order in any manner, the inconvenience, in a judicial view, which the Territory sustains by his absence: and 3. to *summon* Judge Turner to attend at the seat of government, as a member of the legislature." The result was a call by St. Clair for a meeting of the legislature on Sept. 1, 1793—Carter, *Territorial Papers*, 3: 412. But he and Judges Symmes and Turner did not get together until May 1795—*post* n. 84 of Sec. V. Why the Attorney General should have thought that St. Clair, as governor or as one member of the legislature, should have greater power over a territorial judge than the President had, is not apparent. St. Clair himself realized fully his lack of power—*ibid.* 2: 246.

In comparison with Judge Turner's absences those of Judge Symmes of the Northwest Territory were secondary, although he stayed in the East from Feb. 1793 to Sept. 1794 despite what is narrated above—B. W. Bond, Jr., ed., *The Correspondence of John Cleves Symmes* (1926), 163 n. And those of Judge Griffin of the Indiana and Michigan territories were trivial.

⁶⁵ A grand jury of St. Clair County in 1792 presented "that the non attendance of the Judges of the Supreme Court . . . since . . . [1787—they were appointed in Oct.] is a Very great Grievance." This presentment, by order of three *French* judges of the Court of Quarter Sessions, was forwarded to Governor St. Clair with a request that it be forwarded to the President—Carter, *Territorial Papers* 2: 373. Up to the end of 1792 no Court had been held in St. Clair County, and only one in Washington County (Marietta)—*ibid.* 3: 389. Secretary Sargent, in a letter of Feb. 6, 1793 to Judge Symmes upbraiding him for insisting on leaving the territory when the other two judges were in the East, stated that the inhabitants of Knox and St. Clair counties had "publicly complained . . . that *this* Court has not been yet known amongst them"—*ibid.* 3: 406. This seems to be a reference to the preceding petition, though I know of no similar evidence from Knox (Indiana). If it be so, note that Attorney General Randolph, the President, and Secretary of State were seemingly unacquainted with it in April 1793—see last preceding note. Two circuit courts in St. Clair County in 1795 (one held by Judge Turner—*ante* n. 59; the other by Judge Symmes to remedy the situation Turner created—*ibid.* 544), were the only ones held there from 1787-1801. In addition there was one court of oyer and terminer held at Kaskaskia in 1795—*ibid.* 543; and this seems to have been the last one held in either the Wabash region (Knox County) or the two Illinois counties until after the creation of Indiana Territory in 1800—see Philbrick, *Laws of Indiana Territory* (I.H.C. 21), clvii-clviii.

Under the new territorial government the circuit courts seem to have been held more regularly. Nevertheless, as respects the General Court in bank, at Vincennes, in 1807 (April 8) a grand jury presented "as a grievance the non-attendance of the Honorable Thomas T. Davis at this and the preceding General Court"—Record of the General Court (MS), 232. As respects Illinois Territory, in June 1813 a grand jury of St. Clair County (Common Pleas,

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stronger tendency to produce Disaffection to the United States."⁶⁶ Even down to very much later times this absence of judges (and of other officers) remained a problem in territorial administration.⁶⁷

There were other reasons, probably, why the General Court lost ground. The conduct of Judge Turner in the Illinois Country in 1795 was such that the Attorney General held him liable to impeachment, or trial before the General Court, on charges "of oppression and gross violations of private property."⁶⁸ He was never tried, but resigned. Riddance of Judge Symmes was for years desired by Gov-

Cahokia) presented "the non-residence and non-attendance of the judges of the General Court of said Territory as a Public Grievance to the Inhabitants of said Territory"—Nat. Arch.: State Dept., Appointment Papers, Miscellaneous.

In Michigan Territory only two circuit courts were held, seemingly, in the eight years preceding 1805—Philbrick, *Laws of Indiana Territory* (I.H.C. 21), clvii.

In Mississippi Territory the situation was as bad for many years as in the Northwest Territory, except that the cause was not primarily that of the judges. Of the settlements on the Tombigbee and Alabama rivers, nearly three hundred miles from Natchez, Judge Rodney wrote in 1803 "that part of the Territory has been deprived for years of the benefit of a Superior Court"—Carter, *Territorial Papers*, 5: 298. Late in 1806 he wrote: "for near two years past . . . we have had but Two Judges in this part Of the Territory, and one . . . is very seldom Able to attend the Courts"—*ibid.* 489. After this had continued for years the judge mentioned was impeached for habitual intoxication and resigned. In 1809 a new county (Madison) was created far north above the Great Bend of the Tennessee River, four hundred miles from Natchez. The attorneys of the Territory informed Congress that it was too distant for the territorial judges to hold a Superior Court there. The Acting Governor wrote: "The Judges will not, in fact cannot attend the Courts there"—*ibid.* 743, 744. At the end of 1809 there had been no court of criminal jurisdiction held there—*ibid.* 6: 35; and undoubtedly none of civil jurisdiction, though the General Assembly mentioned only the criminal court, obviously considering it more needed. These conditions, in what became Alabama, continued for many years. Judge Harry Toulmin complained in 1815 that he served a district east of Pearl River five or six times as large as that west of Pearl River to which three judges were assigned; no superior court had ever, he believed, been held in a county recently added to his district; he rode 1568 miles yearly, and the contemplated early division of one county into three would add 1600 miles—*ibid.* 6: 620.

⁶⁶ *Ibid.* 2: 618.

⁶⁷ Mr. Hicks has referred to cases in Idaho and Wyoming—J. D. Hicks, *The Constitutions of the Northwest States* (1923, University of Nebraska Studies, vol. 23), 8; and see E. S. Pomeroy, *The Territories and the United States, 1861-1890: Studies in Colonial Administration* (1947), index s.v. "absenteeism." Also *post* cccxcvi seq.

⁶⁸ Report by Attorney General Lee to House of Representatives, May 9, 1796—ASP, Misc., 1: 151-52; report by the House committee approving trial by the General Court—*ibid.* 157; Carter, *Territorial Papers*, 2: 509-18, 544; W. H. Smith, *St. Clair Papers*, 2: 372-74. With reference to troubles of Judge Turner in Knox County see *ibid.* 330; Carter, *Territorial Papers*, 2: 512, 513, 522, 544.

ernor St. Clair and Secretary Sargent, but a legal basis for his suggested impeachment⁶⁹ was lacking. However, his great interests in territorial lands and the notoriety of his questionable acts in marketing them must certainly have affected unfavorably public confidence in the General Court.⁷⁰ At almost the beginning of this situation Jefferson suggested to the President "the establishment of a proper

⁶⁹ "Convinced that Judge Symmes ought to be removed from the Bench of the Supreme Court of your Territory, I beg you immediately to collect and state those facts, on which an impeachment may be founded"—Secretary of State Pickering to Governor St. Clair, Aug. 2, 1799, Carter, *Territorial Papers*, 3: 60.

⁷⁰ Secretary Sargent and Judges Samuel Holden Parsons and Rufus Putnam very clearly held their positions by virtue of their activities for the Ohio Company; and many of the members of Congress were interested in the Scioto speculation that was tied to the Ohio Company's purchase—see Dr. Carter's citations, *Territorial Papers*, 2: 417 n. 88. Governor St. Clair called the President's attention in 1789 to the dangers involved—Carter, *Territorial Papers*, 2: 206; and repeatedly in later years to the attention of the responsible officers of government. Actual influence of the judges' interests is traceable in problems of legislation—(estates in common) W. H. Smith, *St. Clair Papers*, 1: 146, 2: 64-67; T. C. Pease, *Laws of the Northwest Territory* (I.H.C. 17), xxii. Likewise in territorial politics, particularly as respected county seats and the creation of county seats, the struggle over which had fatal consequences for Governor St. Clair—W. H. Smith, *St. Clair Papers*, 1: 214, 220, 221, 2: 477-79, 515-23. Likewise in the judicial problem of giving a single judge power to hold a general court—*ibid.* 1: 190-91; Carter, *Territorial Papers*, 2: 499-500; *ASP, Misc.*, 1: 1160.

Robert McClure, correspondent of Gallatin and purchaser from Symmes of land lying outside his original grant, wrote: "Judge Symmes will be concerned in a great many actions and if they go against him in the lower Court he will immediately Certiorari them to the Supreme Court where he himself sits Judge . . . last summer Judge Symmes was indicted for retailing whiskey the Traverse jury gave it against him and he immediately removed it to the Supreme Court"—Dec. 14, 1796, New York Historical Society: Gallatin Papers (from transcript in Nat. Arch.: State Dept., Misc. Letters). Another letter, incomplete and unsigned, endorsed: "Copy to the Secretary of State 2d Decr 1799," reports actual assurances by Symmes of "removal" to the Supreme Court "should it go against them in the common pleas," and that he would leave writs with the clerk of the General Court for the purpose—*ibid.* (seemingly from Ohio State Library: St. Clair Papers). Though the letters use "removal," there could be such only before trial; after verdicts below there could only be judgments and proceedings in error ("appeals" from local courts). See also petition from inhabitants—Carter, *Territorial Papers*, 3: 30.

On the land proceedings of Judge Symmes see *ibid.* 2: 70 n., 342-48; W. H. Smith, *St. Clair Papers*, 2: 455, 465 *seq.*, 480-81, 507-8, 536. Judge Turner bought from Symmes land to which, Governor St. Clair believed, the latter had no title, and this led to unpleasant controversy—*ibid.* 2: 212 n., 218, 222n. St. Clair had also bought similar land and, so he said, gone much farther than Turner with improvements before discovering lack of title—letter of July 27, 1791, Ohio State Lib.: St. Clair Papers, copy read in State Dept. However, Judge Symmes later acquired title—see Carter, *Territorial Papers*, 2: 343 n. 73.

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judicature for deciding speedily all land controversies between the public and individuals,"⁷¹ but nothing was done either as to that or to prevent personal improprieties in suits involving the judge's personal interests.

Another matter which greatly hurt the prestige of the Ordinance's judicial system was the provision made for one-judge courts in 1792. The statute, quoted above, allowed such courts only "in the absence of the other judges." The great difficulties caused by the same word in the provision, in another law, that the secretary of the Territory should act as governor in case of the latter's "absence," are elsewhere discussed.⁷² In both cases, assuming that the absence intended was absence from the Territory, months passed when neither the governor nor any of the judges could be certain of each other's absence, presence, or whereabouts.⁷³ Nevertheless single judges did at times go on circuit. Both in the Northwest Territory and elsewhere criticisms of these one-judge courts were rife, and for many reasons.

In the first place they involved a very great concentration of power. Two years after they were authorized Governor St. Clair pointed out the dangers of such power in his Territory where the interest of the judges was so great in land, proposing that an appeal be allowed to the United States Supreme Court.⁷⁴ There were two other objections to them that were perhaps even more important. So many references were made to decisions by more than one judge which were "overruled" or "reversed" by a single judge that there must, it would seem, have been holdings of a larger court which were impugned by later inconsistent decisions of a single judge in similar cases.⁷⁵ The

⁷¹ Jefferson to Symmes, Dec. 4, 1791—Lib. of Cong.: Jefferson Papers.

⁷² *Post* ccxcvi seq.

⁷³ *Post* ccxcvii.

⁷⁴ See his letter, Dec. 15, 1794 to the Secretary of State—Carter, *Territorial Papers*, 2: 499; also in *ASP, Misc.*, 1: 116. Compare Carter, 3: 57.

⁷⁵ The writers on Indiana courts have in general so written—notably in L. J. Monks, ed., *Courts and Lawyers of Indiana* (3 vol. 1916), 1: (for example), 727. Talk about "appeals" from the judges on circuit "to themselves"—that is to a General Court in which they might sit alone or with fellow judges—covers the same fallacy even after 1795 (*post* xxxvi-ix). Dr. Farrand adopted some of the most erroneous statements in his generally most accurate and useful thesis—M. Farrand, *The Legislation of Congress for the Government of the Organized Territories of the United States, 1789-1895* (1896), 27 n. 58. After stating the one-judge provision of the act of Congress of 1792 he says: "An appeal lay to the superior court from the inferior courts, in which the presence of two judges was required. So a suitor was forced to appeal from the decision of two men to that of one"—*ibid.* Every

importance of such cases does not lie so much in the superficial facts stated as in their effect upon popular regard for the Court. The local courts were manned by several judges; the General Court was known to *have* three judges, if they attended to their duties. The outlying counties were slighted by the rarity of the courts held within them, and the attendance of only single judges, and they justifiably resented such neglect. Nor were direct conflicts between judges, such as those between Judges Turner and Symmes in the successive sessions of 1795 at Kaskaskia and Vincennes—or the rumors just referred to of single judges “overruling” several judges—calculated to preserve respect for the Court. There was still another reason for complaint as respected criminal cases. As already said, the General Court had exclusive original jurisdiction over capital felonies. All that the local courts could do was to hold such prisoners for trial before a territorial judge, and although courts of oyer and terminer were more numerous than the regular civil-and-criminal General Courts on circuit they were not sufficiently frequent; besides, the prisoners often escaped from the miserable jails.⁷⁶ The local courts could attend to all civil and criminal business except these felonies; the duty to attend to them was so primary that all territorial courts were rather generally known as courts of oyer and terminer; and the unsatisfactory discharge of the one function detracted from whatever credit was due for the better performance of other functions.

Such one-judge courts were originally thought to be justified by the small number of judges available for riding circuit. That even single judges held the courts so irregularly is understandable in view of the hardships and even perils of circuit riding⁷⁷ and the immense

adjective and every conception and every proposition in this passage is incorrect as respects the Northwest Territory before 1795. In Michigan Territory, where they had for a time a *true* “circuit system” instead of the “*ad hoc*” system” set up in the Northwest Territory, such language as that above referred to would, for a time, have been correct. See W. W. Blume, *Supreme Court of Michigan Territory*. 5: xxiii-xxiv.

⁷⁶ See references in n. 10 *ante*.

⁷⁷ Judge Symmes, wishing to go to the Illinois Country, wrote in Jan. 1798 to Acting Governor Sargent: “A rout by land will be attended with high waters in all the rivers which we must swim with danger or raft with difficulty with no tools for the purpose. We shall meet with no pastures in the woods for our horses; the days are short and cold, of course can make but little speed; the pararies ankle-deep in water for many days travel at this season; all the roads miry and slippery, or hard frozen & rough. . . . When I had the honor of accompanying General St. Clair into that country in September 1795, we were twenty nights in the woods when the days were

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size of original counties. Knox County, for example, included until the creation of Indiana Territory in 1800 a large part of what is now Illinois as well as virtually all of what is now Indiana.⁷⁸ Governor St. Clair was never able to secure a full court at any point west of Cincinnati.⁷⁹ Conscientious judges realized the objections to which the courts they held were open.⁸⁰ It was only after many years that Con-

long and season temperate, and wild food for our horses in the greatest plenty; yet under these favorable circumstances, we suffered in Many respects extremely; not to mention the loss of four of our horses stolen from us in one night by the Indians." He preferred in the winter season to go by boat, in which stores and bedding could easily be transported, and requested a boat with a "small party" of oarsmen (ten), not having the means to hire them himself—Jan. 18, 1798, Massachusetts Historical Society: Sargent Papers (copy read in State Dept.).

Judge Symmes always wished an escort, perhaps in part because it gave dignity to his office. In 1791 he wished a boat and escort of soldiers up the Ohio from Northbend to Marietta—letter of Sept. 8, 1791 to St. Clair, Nat. Arch.: State Dept., Misc. Letters. In reference to requests in the following January for escorts on circuit, the Secretary of State consulted the President; would he furnish military escort or Congress provide civil?—Jefferson to Washington, March 28, 1792, Lib. of Cong.: Jefferson Papers. A boat seems to have been provided early in 1792 "for the purposes of Civil Government," but was appropriated by the army in the following winter. Secretary Sargent later sought from General Wilkinson assurances of an escort up the Ohio from Cincinnati in the spring of 1793, the Secretary of War having ordered General Wayne to furnish escorts for the governor, acting governor, or judges when on public business—Carter, *Territorial Papers*, 3: 387-89. But this only secured Wilkinson's answer that he would order Wayne to furnish escorts when consistent with public service—letter cited *ibid.* 388 n. 99. In March 1795 Judge Symmes again sought an escort from Marietta to Vincennes to hold a General Court in May—letter March 26—W. H. Smith, *St. Clair Papers*, 2: 339-40.

On the other hand Acting Governor Sargent wrote, as he started on Sept. 8, 1797 from the Rapids of the Ohio for Vincennes and the Illinois Country: "my *whole Force* three hunters—but the adventure seems to me absolutely necessary"—Carter, *Territorial Papers*, 2: 626, 3: 485, 487.

⁷⁸ See maps inside back cover of Philbrick, *Laws of Indiana Territory* (I.H.C. 21).

⁷⁹ W. H. Smith, *St. Clair Papers*, 1: 194-95.

⁸⁰ The situation was different when one of the judges was assigned permanently to "localized" duties in an outlying region. The objections then became more personal to the judge, no matter how conscientious he might be, and concerned less the relations between his court and the home General Court. Judge Harry Toulmin, who attended for years to the civil and criminal cases of an area in the Mississippi Territory (in what is now southeastern Mississippi and southern Alabama) estimated by him at one hundred thousand square miles, in addition to admiralty and other federal business, wrote in 1815: "I have so great an aversion to the plan of one judge presiding in the same courts a succession of years as I do,—and have witnessed so much the practical evils resulting from it; that I would rather ride to Madison county once a year, (though nearly 400 miles off,—and mostly through a wilderness) than attend one half of the courts [of 7 counties] which I now do in my own neighborhood, as it were"—Carter, *Territorial Papers*, 6: 621.

gress became convinced that courts of single judges should not be permitted, and in several territories they were forbidden.⁸¹

There were probably very few citizens who recognized the circuit court as the General Court on circuit, in distinction from a localized tribunal inferior to the General Court. Its nature was made more obscure by legislation in 1795. The governor and judges, in their revised law of that year on courts, provided in one section (8) that there should sit twice yearly in the Territory, at Marietta and at Cincinnati, "a Supreme court of record, which shall be called and stiled, *The General court*," and each and all the judges thereof should have power to issue, whenever there might be "occasion" so to do, "writs of habeas corpus, certiorari, and writs of error, and all remedial and other writs and process, returnable to the said court." It then, in the next section (9), proceeded:

Provided always, That upon any issue joined in the said General-court, such issue shall be tried in the county whence the cause was removed, before the judges aforesaid, or any one of them, as a *circuit court*; who are hereby empowered and required, if occasion require, to go the circuit, twice in every year, into the counties of St. Clair and Knox, and such other counties as may hereafter be erected, to try such issues of fact as shall be depending in the said General Court, and removed out of either of the counties aforesaid; (when and where they may try all issues joined); or to be joined, in the same General court, and to do, generally, all those things that shall be necessary for the trial of any issue, as fully as justices of *nisi prius* in any of the United States may or can do.⁸²

What did this statute mean? In the margin of the laws as published in 1795 the above-quoted section is analyzed as meaning: "Circuit courts established in St. Clair, Knox, and other counties"—which only repeats the vague language of those who have written of the judicial system of the time without distinguishing "*nisi prius* courts" held by judges of the General Court on circuit and circuit courts of an independent but inferior status. Up to 1795 the courts in question had been true *nisi prius* courts. The section of the law just quoted

⁸¹ Compare sec. 10 of the organic act of Missouri Territory, June 4, 1812—*U. S. Statutes at Large*, 2:746; act of Feb. 24, 1815 relating to Indiana Territory—*ibid.* 3: 213; act of Feb. 5, 1825 (sec. 6) relating to Michigan Territory—*ibid.* 4:81. Perhaps more judges were generally available, perhaps circuit riding was no longer a hardship; I find no *general* law prohibiting such courts. Compare *post* following notecall 82, also n. 87.

⁸² T. C. Pease, *Laws of the Northwest Territory (I.H.C. 17)*, 156-57.

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speaks at greatest length of causes "removed" from the counties of Knox and St. Clair, and the procedure prescribed by it as to issues of fact involved in such cases is precisely that required by the statutes since 1788, as already explained.⁸³ It is, indeed, stated that the judges sent on circuit to try these issues of fact will try them "as a circuit court," but that did not mean that their courts would be independent and inferior courts. It is also said that the judges on circuit shall act "as justices of *nisi prius* in any of the United States." And in still another section (10) the law very explicitly stated the jurisdiction, original and in error, of the General Court; but the only courts whose errors were declared to be subject to correction, and whose judgments should be reversed or affirmed, were courts "holden for the respective counties"—that is, "the quarter-sessions . . . and common pleas, or any other court [of] the respective counties." *Nisi prius* courts were held in one or another county, but they were not courts of or courts held for that county.

The things the statute did were four. First, it established fixed seats of justice in Ohio for the General Court as such. Second, it declared *explicitly* that as respected issues of fact in certain counties they should not be tried in bank, but in the manner stated. Third, it *implied* that in the only other counties then existing—namely those of which Marietta and Cincinnati were the county seats—original jurisdiction should be taken, in the General Court of each, solely of causes of action therein arisen or of crimes there committed, so that all issues of fact would be tried before the Court in bank.⁸⁴ Fourth, provision was expressly made in another section of the law (12) for the exercise through courts of oyer and terminer of the Court's exclusive original jurisdiction over felonies of death.

In addition to these things done there were two things, far more important in their logical implications, which the law did *not* do. In

⁸³ If I understand Mr. Blume's statement that "By the terms of the statute it is clear that the General Court was no longer to sit in bank for the trial of issues of fact in civil cases" (W. W. Blume, *Supreme Court of Michigan Territory*, 5: xv) the "no longer" is misleading as respects past usage, and as to Washington and Hamilton counties misleading as to future usage.

⁸⁴ It did not imply, though a layman would suppose it did, that issues of fact arising in civil actions or criminal prosecutions *begun* in the Court at Marietta or Cincinnati would be tried in bank, even though the cause of action had arisen or the crime been committed in St. Clair or Knox counties. As earlier indicated fundamental principles of common law forbade this.

the section last cited it referred only to the power of the General Court "to deliver the jails of all persons who . . . shall be committed for . . . felonies of death," and provided for the exercise of its power "for that end." No mention is made of, or words used broad enough to cover, a court of general criminal jurisdiction exercisable on circuit. And, quite in line with that omission, no provision whatever is present for the exercise on circuit of the Court's general civil jurisdiction. So far as one can judge from the absence of positive provisions relating to civil jurisdiction—and the plain implication respecting criminal jurisdiction carried by the section just cited—it would seem that the legislators *intended to abolish* the general system of *nisi prius* courts trying civil and criminal cases under the Court's unlimited original jurisdiction. That is, intended this as respected St. Clair, Knox, "and such other counties as may hereafter be erected." Such an inference, however, is contradicted by all the later *talk* of holding "circuit courts" in the western counties, particularly in 1797-1798.⁸⁵ It would not be inconsistent, on the other hand, with the subsequent appointment, the same and the following year, of clerks of "the Circuit Court" in St. Clair and Knox counties,⁸⁶ for circuit sessions of the General Court *were* to be held there to try issues of fact in *some* cases (and also—the same thing under a special name—courts of oyer and terminer to try capital crimes).

On the whole it is fairly clear that the purpose of the statute could not have been to abolish the general system of *nisi prius* courts trying civil and criminal cases in St. Clair and Knox "and such other counties as [might thereafter] be erected." The judges certainly knew what the law meant, and when Acting Governor Sargent urged Judge Symmes to go on circuit in 1798 the latter did not reply that the court could have no legal basis; but on the contrary (though he never went) replied: "the dignity and safety of the general government seems to demand this duty from me."⁸⁷

⁸⁵ See particularly Carter, *Territorial Papers*, 3: 493-94, 498, 502.

⁸⁶ *Ibid.* 442, 443, 464.

⁸⁷ Letter of Jan. 18, 1798 cited *ante* n. 77. Sargent had just come from Illinois—*ante* end of same note; he was greatly agitated over the possibility of war, and even if the statute of 1795 had abolished the circuit sessions of the Court he might have overlooked the fact. In assuming that one judge could hold the Court (notwithstanding that Judge Joseph Gilman was also seemingly in the Territory) Sargent might well have assumed that the law of 1795, just discussed, gave legal basis to the practice since 1792 of disregarding the limitation placed by the federal act of 1792 (*ante* n. 63) upon its sanction of one-judge courts.

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The first law of Indiana Territory regulating its courts reproduced with slight changes the above law of 1795. Nevertheless those changes make it a trifle easier to read the murky verbiage of section 9 as meaning that the trial of issues of fact in cases theretofore removed into the General Court, before the one or more of its judges who were directed "to go the circuit . . . in each county every year," was only a part of their *nisi prius* duties.⁸⁸ In the revision of 1807 there was a return to some of the most puzzling language of the act of 1795, but this was added:

That the Circuit court shall render a final judgment, and issue execution upon verdict found in the said Circuit court, in the same manner that the General court has power to do, unless a bill of exceptions shall be filed to the opinion of the said Judge, or some other good cause shewn, which in the opinion of the said Judge holding such Circuit court, may render it necessary that the determination of the General court should be taken thereon; and the said Circuit court shall have power to grant and order new trials.⁸⁹

It is manifest that the grant of these three powers to the circuit court constituted a great step toward making it a distinct tribunal and toward creation of an appellate court system. The immediate result was a mixture of an appellate and a *nisi prius* system. In particular, supervisory control by the General Court would have been exercised under the latter through a motion for a new trial.⁹⁰ In other territories, before or after this, the same tendencies were visible.⁹¹

IV

Along another line, development had taken place that was a departure from the system established by the Ordinance. That had given to the General Court only a common law jurisdiction.⁹² We

⁸⁸ Philbrick, *Laws of Indiana Territory* (I.H.C. 21), 10-11.

⁸⁹ *Ibid.* 231.

⁹⁰ After referring to the power of jail delivery generally, and to special courts of oyer and terminer, the statute refers to "the said Circuit and *Nisi Prius* courts" as though the latter were the criminal courts only.

⁹¹ For Mississippi Territory see Carter, *Territorial Papers*, 5: 360 (Judge Rodney's letter of Dec. 12, 1804), 361-66 (memorial of territorial legislature, Dec. 14), 373 (Rodney's letter of Jan. 24, 1805). On Michigan see the account in W. W. Blume, *Supreme Court of Michigan Territory*, 5: xxvi *seq.*

⁹² Until the unreported debate of April 26, 1787 a chancery jurisdiction had been included—*Journals of the Continental Congress, 1774-1789*, 30: 253, 404; 31: 670; 32: 242, 281 and n. 1. (The Library of Congress ed. is always the one cited.) Another amendment of exceeding importance made that

have already seen that it was assumed by the territorial legislature that it might create local courts which could share *that* jurisdiction concurrently with the General Court. The legislature also assumed that the restriction placed upon the jurisdiction of the General Court by Congress did not require it to limit similarly the jurisdiction of the independent courts which it created in each county. The third law that it passed in 1788 established a judge of probate in each county.⁹³ Such a court being indispensable, and Congress not having passed any legislation supplementary to the Ordinance, the action of the legislature was certainly not surprising, but here again one must wonder at both the original limitation set by Congress and at the failure later to correct it. The establishment of the orphans' court in each county in 1795 was another act unjustified by the organic act.⁹⁴ The law of 1795 on divorce was still another.⁹⁵ Appeals—unknown to a common law jurisdiction—were allowed to the General Court from the probate and the orphans' court.⁹⁶ Most notable was the attempt to secure a chancery jurisdiction, which had been included in drafts of the Ordinance for most of the time it was in preparation but was suddenly and unaccountably struck out.⁹⁷ The territorial legislature adopted two laws of limited scope from Massachusetts that authorized relief—in most states equitable—in certain important situations. Massachusetts, however, was a state then and for a long time thereafter without equity courts, and which allowed much equitable relief through common law actions; and Pennsylvania, from which a heavily predominant portion of the statutory system of the Northwest Territory was taken, was an even more notable example of the same practice. Presumably, Governor St. Clair, who was very familiar with the Pennsylvania situation, felt secure in the position that these laws, so “adopted” in the usual manner, could be defended as instances of common law jurisdiction.⁹⁸ By an act of Congress of 1805 the same day, for which as in the matter here in question there could have been no time for proper consideration, is discussed *post* ccciii-iv and n. 58.

⁹³ T. C. Pease, *Laws of the Northwest Territory* (I.H.C. 17), 9.

⁹⁴ *Ibid.* 181.

⁹⁵ *Ibid.* 28.

⁹⁶ *Ibid.* 9, 186; in the latter case “to the General or circuit courts”—that is to the General Court where most convenient, which would ordinarily be to the next circuit session in the county.

⁹⁷ *Ante* n. 92.

⁹⁸ See Philbrick, *Laws of Indiana Territory* (I.H.C. 21), clxiii-clxviii. Some old and important material there cited is now more readily accessible in Carter, *Territorial Papers*, 7: 160, 547, 685.

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torial court in all territories in which there was no United States district court was given, in cases involving the United States, the powers of the district court of Kentucky, with provision for appeals and writs of error from such superior courts of the territories to the Supreme Court of the United States in such cases. The question of granting equity jurisdiction to the territorial courts had become entangled in congressional committee assignments with the question of granting *appeals* from those courts to the Supreme Court, and thus entangled with the appellate system of the federal courts.⁹⁹ The result was a fairly broad but not altogether satisfactory jurisdiction in equity.¹⁰⁰ The legislature of Indiana, the same year, therefore passed an act establishing a separate court of equity.¹⁰¹

⁹⁹ The matter of appeals from territorial courts to the Supreme Court was settled (with some initial variations as to mode—direct or first to a federal circuit court,—sums involved, etc.) in the 1820's. It is not involved in the present discussion.

The act applied only to territories then existing; no general rule of policy applicable to future territories was laid down. The courts of Indiana and Missouri territories (but not the same courts!) were given chancery powers in 1816—*post* n. 157; though the Indiana legislature had assumed to give its territorial court the same powers in 1807—as noted just below in the text. But the territorial court of Michigan Territory was not given like powers until March 3, 1823—*U. S. Stat. at Large*, 3: 769. Its governor and judges had indeed theoretically endowed the court with those powers in 1805, but Blume finds no trace of their exercise—W. W. Blume, *Supreme Court of Michigan Territory*, 1: 1-li. The territorial legislature had also given chancery powers in 1815 to the county courts established that year.

¹⁰⁰ Act of March 3, 1805—*U. S. Stat. at Large*, 2: 338. The jurisdiction of the federal district court of Kentucky was unusually broad, equaling that of a federal circuit court apart from the latter's appellate jurisdiction. The Ordinance had been violated, if its intent was to exclude all jurisdiction other than of common law, sometimes by the creation of courts of other than common law jurisdiction (*ante* following notecall 92), sometimes by introducing specific powers unjustified by that jurisdiction (*ante* following notecall 97, Philbrick, *Laws of Indiana Territory*, I.H.C. 21, clxiv n. 4). There had long been in this country a strong prejudice against equity which almost certainly caused its omission from the Ordinance; it was again manifested in a popular memorial the instant the separate court was established and for several years thereafter (*ibid.* clxi, clxiii, clxvi, clxviii). It still seems to me, therefore, strange (*ibid.* clxvi) that the territorial legislature, immediately after passage of the federal law, and at the moment it was *abolishing* several courts, should have *directly* challenged Congress by erecting the separate court of equity. Mr. Blume misconceived my meaning—W. W. Blume, *Supreme Court of Michigan Territory*, 1: xlviii.

¹⁰¹ Philbrick, *Laws of Indiana Territory* (I.H.C. 21), 108. An equally bold violation of the Ordinance (not by creating a separate equity court but by conferring equity jurisdiction on the Ordinance common law court) was made by the governor and judges of Michigan Territory (created by an act of Jan. 1805) by a territorial law of July 1805—W. W. Blume, *Supreme*

V

There is much in the preceding pages that evidences a remarkable disregard for the Ordinance as an organic act or constitution for the territories. The actions of the territorial legislature respecting the judicial system seem to have been sometimes based on the theory that in default of legislation by Congress to supplement the Ordinance, whatever the legislators did was done for and under full powers from Congress. The remarkable inattention of that body to the territories for several decades gave some excuse for such an attitude.

It is not to be forgotten, also, that only very slowly did the relation of the territories to the federal system begin to appear, even in general outline. A realization of this fact aids one in understanding much of what has gone before. It may be excusable, therefore, to devote a meager space to its emphasis. A county court in 1795 indicted the Secretary of the Northwest Territory, under a territorial law against usurpations, for acting as governor after Governor St. Clair had (though Secretary Sargent did not know that) re-entered the Territory; and there were citizens who wondered why nothing more was heard of the proceedings after their removal into the General Court.¹⁰² It was not understood in the early territories that treason committed *in* the territory was not treason against the territory. Even those who saw *that*, joined in passing laws on crimes that included treason, although they also knew that their sole legislative power—to adopt laws of the original states—did not permit them to adopt laws

Court of Michigan Territory, 1: xlix. Somewhat similar legislation (the law has not been accessible) had taken place before 1806 in Mississippi Territory—Carter, *Territorial Papers*, 5: 437.

¹⁰² *Ibid.* 2: 512, 574; 3: 456. W. H. Smith, *St. Clair Papers*, 2: 415-16. T. C. Pease, *Laws of the Northwest Territory* (I.H.C. 17), 19. The charge against Governor Harrison that he approved "a law requiring, under the penalty of five hundred dollars one of the [United States land] Commissioners . . . to deliver to the Territorial Auditor a transcript of all the confirmed claims in that office" (Carter, *Territorial Papers*, 7: 546) was a fabrication. There was no law and no resolution such as *stated*. There was, however, a law taxing *claims* to land—Philbrick, *Laws of Indiana Territory* (I.H.C. 21), 147, sec. 3; and another law penalizing, as *stated*, any "other person in whose possession the records and proofs of the grant and confirmation of land may be"—*ibid.* 174. No doubt there was debate in the Assembly on the subject, and there can be little doubt that knowledge of the Commissioners' findings was desired and obtained, though the evidence is wholly circumstantial. See *ibid.* xlvii (n. 2 should have included cross references to the following pages), lix and n. 3, xvi n. 4, cxvii-cxviii.

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of the United States.¹⁰³ The relation of the Constitution to the territories was of course not understood. Some queries were raised by officials as to the applicability to the territories of the Bill of Rights,¹⁰⁴ but since we are not clear today on that point, necessarily they were not. The relation of the territories to statutes of the United States was very unclear. The Ordinance of 1787 declared that the Northwest "territory and the states . . . formed therefrom, shall forever remain a part of this Confederacy of the United States of America." Even in 1787 the words "a part" had two utterly different meanings. The words were not changed in 1789 when the Ordinance was re-enacted. Yet on these words of a dead statute, without referring to the Constitution or discussing their meaning thereunder, two attorneys general of the United States based opinions that *all* federal statutes were applicable in the territories¹⁰⁵—though Governor St. Clair showed he was a better lawyer in refuting them.¹⁰⁶ A committee even reported to the House of Representatives the same views, with the additional opinion that "the Court established there by Congress has from its nature & constitution the authority to execute the said laws"¹⁰⁷—which, if true, would have solved the treason problem. As with reference to everything else in legislation on the territories, what was put into their organic acts depended on the personnel of the committees on territories when a territory was admitted. They reveal only varying practices.¹⁰⁸ By a law of 1801 the Northwest and

¹⁰³ See just below and *post* ccccxiv; Carter, *Territorial Papers*, 2: 319, 358.

¹⁰⁴ Could a territorial legislature extend the jurisdiction of a justice of the peace to matters involving values above \$20, with no jury trial in the justice's court, without violating the Seventh Amendment? Jury trial being provided for in county courts, could appeals from a justice of the peace to those courts be made conditional (on giving bond to prosecute the action, abide by the judgment, etc.) without violating that amendment?—*ibid.* 6: 251-52. The Ordinance was federal legislation that bound a territory's courts and legislature; did a law providing imprisonment for debt violate the Ordinance's prohibition of slavery or involuntary servitude?—*ibid.* 2: 579.

¹⁰⁵ *Ibid.* 2: 520-21, 3: 66. *Post* at notecall 8 of Sec. V.

¹⁰⁶ *Ibid.* 2: 521, 523-24 and (a later elaboration of St. Clair's views) W. H. Smith, *St. Clair Papers*, 2: 378-83, Carter, *op. cit.* 3: 58. Compare Webster's colloquy with Calhoun in 1849—*Congressional Globe*, 30 Cong. 2 Sess. App. 273-74.

¹⁰⁷ Carter, *Territorial Papers*, 5: 311-12.

¹⁰⁸ Usually the organic acts contain nothing. In those of Orleans Territory and Florida more than a score of federal laws were declared to be in force therein. A declaration that "the Constitution, and all laws of the United States which are not locally inapplicable, shall have the same force

Indiana territories were included within the federal judicial system as a district of the Sixth Circuit of the United States; in 1802 that law was repealed, and cases pending in the district were continued in the superior courts of the territories;¹⁰⁹ in 1804 a federal district court was established in the Territory of Orleans;¹¹⁰ and by an act, already cited, of 1805, the superior or supreme courts of other territories (in which no federal district court existed) were given, in cases in which the United States was a party, the powers of the federal district court of Kentucky and a right of appeal to the Supreme Court.¹¹¹ In 1806 Congress extended to the territories the provisions of an earlier act respecting compensation of jurors and attorneys in federal cases,¹¹² and finally—after appointments of United States attorneys in individual territories¹¹³ (with some confusion between the attorneys general of the latter and the federal attorneys for territories coextensive with judicial districts¹¹⁴)—an act of 1813 provided for United States attorneys and marshals in all territories.¹¹⁵

Considered in conjunction with the failure of Congress to act, all this confusion—in Philadelphia and Washington as well as in the territories—respecting the relation of the territories to the federal system, political and judicial, explains perfectly well why the terri-

and effects within the said Territory of . . . as elsewhere within the United States" was included in the organic acts of New Mexico, Utah, Nebraska, Kansas, Nevada, Colorado, Dakota, Montana, Wyoming, and Oklahoma. During the same period (1850-1890), the organic acts of five other states contained no such provision. In those of Utah and Oklahoma the comma after Constitution was omitted. For other illustrations of the matters which different chairmen thought meaningful in organic acts see *post* cccxxxvii-viii, cccxliii and nn.

¹⁰⁹ Acts of Feb. 13, 1801 (secs. 4, 7)—*U. S. Stat. at Large*, 2: 90, 91; March 8, 1802—*ibid.* 132; April 29, 1802 (sec. 10)—*ibid.* 163.

¹¹⁰ Act of March 26, 1804—*ibid.* 2: 283; Carter, *Territorial Papers*, 9: 208. The existence of this unique federal court in a territory explains why the grant of jurisdiction in the act next cited was limited to territories in which no federal district court existed.

¹¹¹ Act of March 3, 1805—*U. S. Stat. at Large*, 2: 338.

¹¹² Act of April 18, 1806 extending act of Feb. 28, 1799 so far as applicable to the act of March 3, 1805—*ibid.*

¹¹³ Carter, *Territorial Papers*, 3: index *s. v.* "Attorneys of U. S."; 4: index *s. v.* "Attorneys, District"; 5, 8: index *s. v.* "U. S. Attorney."

¹¹⁴ See Carter, *Territorial Papers*, 10: 350, 354, 491, 568, 570. There were minor instances elsewhere of confusion. The Attorney General of the Northwest Territory sought instructions whether he should prosecute for the United States—letter of Nov. 20, 1796 (Ohio Stat. Lib.: St. Clair Papers, copy read in State Dept.).

¹¹⁵ By act of April 18, 1806 cited in n. 112 and act of Feb. 27, 1813—*U. S. Stat. at Large*, 2: 806.

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torial legislatures felt so free and went so far in regulating the General Court. It is unbelievable that St. Clair, Parsons, and Varnum—all fresh from the East, all familiar with the leaders of the government in Philadelphia—would have sat down in Marietta in 1788 and with their first four enactments set the course of all that followed, without prior counsel on their general objectives. As has been seen, virtually all that was done was not only acquiesced in, but ultimately adopted by Congress in its own legislation.

In 1805 the legislature of Orleans Territory was empowered to establish inferior courts, and similar action was taken in the case of Missouri in 1812.¹¹⁶ Presumably, formal action was taken in the case of those territories because of their alien origins; in the case of the Old Northwest acquiescence in legislative usurpation—if it was such—seemed sufficient. Mississippi Territory started with the Ordinance of 1787 as its organic act, and with Secretary Sargent of the Northwest Territory as its first governor, and with the laws of the latter territory (long the only ones available) as the model for its early legislation; consequently, with precisely the same judicial system.¹¹⁷ Following, however, a wise precedent set in the Southwest Territory, various of its judges, if not all, were required to reside in the Territory.¹¹⁸ Perhaps by chance they resided in different “districts,” which facilitated circuit sessions. And following another precedent set in the Southwest Territory, some judges—in future cases of a similar nature, at least usually “additional judges” appointed for geographical reasons—were required to reside in particular districts.¹¹⁹ All this made it more natural after some years to seek from Congress authority to establish independent and inferior courts, one in each district, with appeals from them to the territorial superior court, and this authority was in fact granted by Congress.¹²⁰

¹¹⁶ Acts of March 26, 1804—*ibid.* 2: 283, Carter, *op. cit.* 9: 205; act of June 4, 1812—*U. S. Stat. at Large*, 2: 743, Carter, *op. cit.* 14: 552.

¹¹⁷ Carter, *Territorial Papers*, 5: 20; and compare 94 n. 15 with the titles of laws in T. C. Pease, *Laws of the Northwest Territory* (*I.H.C.* 17).

¹¹⁸ Compare Carter, *op. cit.* 4: 26, 48 with 5: 38, 99.

¹¹⁹ *Ibid.* 5: 374, 6: 42; acts of March 27, 1804 and March 2, 1810—*U. S. Stat. at Large*, 2: 301, 563.

¹²⁰ By the act of March 2, 1810 cited in last note. There was, naturally, a choice between such a system and a pure *nisi prius* system, the circuit sessions reserving points of law for the territorial superior court in bank—Carter, *Territorial Papers*, 5: 360, 362-63, 373-74, 387, 436; 6: 150.

VI

Illinois, in 1812-1814, transformed its judicial system without asking authorization from Congress, although what it did was in substance ratified. Immediately after organization of the Territory in 1809, the governor and judges (June 19) repealed the section of the revised laws of 1807 which required yearly circuit sessions of the territorial judges to try issues of fact joined in the General Court.¹²¹ A month later they repealed sections of a law (of June 16) relating to the common pleas and gave to the General Court all jurisdiction, original and final, over all suits and process of civil or criminal nature, theretofore vested in the General Court, circuit courts, and common pleas; but made all actions and process triable in the county of origin.¹²² Further legislation relating to the Court by the governor and judges was confined to changes of the terms and fees. If the judicial system had not before been in politics such great and sudden changes would have put it there, and it remained a political issue substantially through the territorial period.

The first elective legislature, of 1812, re-established the system of the revised law of 1807 save as modified. It repealed the provisions of that law establishing circuit courts, leaving the common pleas and General Court. It provided that the latter should thereafter have no original jurisdiction under \$500, should have cognizance of errors in law only, and that judgments of the common pleas on appeals from justices of the peace should be final.¹²³ To one regulation by the legislature the judges of the Court already refused obedience.¹²⁴

¹²¹ Law of June 19, 1809—C. W. Alvord, *Laws of the Territory of Illinois, 1809-1811* (1906), 3—*post* 8; repealing sec. 2 of act of Sept. 17, 1807—Philbrick, *Laws of Indiana Territory* (*I. H. C.* 21), 230. This action, however, was an afterthought; the repealing act was supplementary to another passed three days earlier (*post* 5) which repealed certain laws and parts of laws.

¹²² Except jurisdiction in causes involving less than \$20 appealed from justices of the peace. Secs. 10, 2, 3 of act of July 20, 1809—C. W. Alvord, *Laws of the Territory of Illinois, 1809-1811*, 4—*post* 8. The repeal, by sec. 10, was of secs. 1, 2 of act of June 16—*ibid.* 2, *post* 6.

¹²³ Secs. 1, 7, 3, 5 of act of Dec. 25, 1812—*post* 75-76. The law of 1807 is cited *ante* n. 121.

¹²⁴ This same law of 1812 required each judge to prepare "a plain but full statement of the Case or points decided . . . with his opinion thereon" in writing, and file it with the clerk, who should record it—sec. 4, *post* 76. The law of Dec. 10, 1813 required this to be done by the senior judge—sec. 15, *post* 102. In *Pope's Digest, 1815* (*I. H. C.* 30), 2: 321, this section is indicated as "not in force." The law of Dec. 13, 1814 required each judge to give a written opinion in cases heard on appeal or under writs of error—sec. 16, *post* 140; and so it stood in Pope—*ibid.* 341.

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This act of 1812 was displaced by a more elaborate one a year later. It attempted, unsuccessfully, to enforce by a penalty the denial of jurisdiction under \$500.¹²⁵ It repealed the provision of 1807 for commissioning special courts of oyer and terminer, providing instead for the prompt summoning of a jury by any judge of the General Court and for the summoning of a special term of the Court, but limited its jurisdiction to capital crimes.¹²⁶ The restriction of its jurisdiction in error to points of law was continued,¹²⁷ and proceedings in equity, with jurisdiction in causes exceeding \$100, were elaborately regulated.¹²⁸

In 1814 the legislature set to work on the yearly attempt to make the system satisfactory. This time the Court was renamed, becoming the "Supreme Court of Illinois Territory,"¹²⁹ to sit in every county, with an unlimited original civil jurisdiction at law and in equity of all cases involving more than \$20, and a criminal jurisdiction no longer limited to capital offenses.¹³⁰ The change in name—which proved to be not unimportant in succeeding controversy—was emphasized by a provision in a supplementary act that repealed so much of any prior law "as [gave] the style of the 'General Court' to the court [theretofore] required to be held by the supreme or superior Judges" of the Territory, holding by appointment of "the president and Senate of the United States."¹³¹ The change in jurisdiction was similarly emphasized in the supplementary act by a provision that "the Judges of the Supreme Court [should] perform all the duties imposed on the former General Court not inconsistent, with the provisions" of the act creating the new Court and the act supplemental thereto.¹³² The courts of common pleas, after disposing of the causes then depending in them, were not to have or exercise "any Jurisdiction given to the Supreme

¹²⁵ By amercing in all costs a plaintiff who should thereafter *recover* less than \$500—sec. 14 of act of Dec. 10, 1813, *post* 102. This section was also indicated by Pope as "not in force"—Philbrick, *Pope's Digest, 1815* (*I.H.O.* 30), 2: 321, but the repeal in 1814 of the monetary limitation was the reason. Under the act of Dec. 13, 1814 creating "the Supreme Court of Illinois Territory" *appellate* jurisdiction was again taken (see *ante* n. 122) of appeals involving less than \$20—sec. 2, *post* 137.

¹²⁶ Secs. 5-8 of same act of Dec. 10, 1813—*post* 99-100.

¹²⁷ Sec. 16—*post* 102.

¹²⁸ Secs. 17-39—*post* 102-7.

¹²⁹ Sec. 1 of act of Dec. 13, 1814—*post* 136.

¹³⁰ Secs. 2-4 of same—*post* 137.

¹³¹ Sec. 1 of supplement act of Dec. 22, 1814—*post* 160.

¹³² Sec. 3 of same—*post* 160.

Court";¹³³ that peculiar language being used because the two acts dealing with new "county courts" that took the place of the common pleas had not yet been passed.¹³⁴ One judge might hold the Court except in the trial of capital crimes, for which two were required, and for which speedy trial was promised.¹³⁵ All suits and prosecutions for crime were, of course, to be tried in the counties where the causes of action arose and the crimes were committed.¹³⁶ And, of course too, nothing was changed by this act or those which preceded it as regarded federal cases in the territorial court.

This enactment had very probably long been in contemplation by those who were chiefly responsible for it.¹³⁷ In the preceding May a committee had been appointed to call on the clerk "of the late General Court"—which might be regarded as a premature characterization, in view of the fact that the law of December 10, 1813 had left the Court that *name*—for an account of suits begun in the same during two preceding years; and they were informed that "only one suit had been commenced at common law" in that period.¹³⁸

¹³³ Secs. 6 and 18 of act of Dec. 13, 1814—*post* 138, 140.

¹³⁴ Namely, the acts of Dec. 19 concerning county courts and that of Dec. 24 supplemental thereto—*post* 149, 169. The powers and jurisdiction of the former courts of common pleas were simply transferred to the new county courts, "except such as [had] been transferred to the supreme court or the Judges thereof"—second act cited.

¹³⁵ Secs. 7, 8, 17 of act of Dec. 13, 1814—*post* 138, 140.

¹³⁶ Secs 4, 7 of same—*post* 137, 138.

¹³⁷ Whom I would take (from the Journal of the Legislative Council—MS in Illinois State Archives) to have been above all others William Biggs—see Philbrick, *Laws of Indiana Territory* (I.H.C. 21), ccxlix-ccl. He introduced the bill on Nov. 25—Journal, 23; represented the Council in requesting Governor Edwards' comments on the judges' objections to the bill—39; and in delivering to the judges the answer of the General Assembly—43; moved the printing of the documents for transmission to Congress—51; introduced the supplementary bill—52 (*ante* n. 131); and represented the Council in the committee of two (one from each house of the Assembly) that drafted the memorial to Congress—54.

¹³⁸ Journal of the Legislative Council, 54, 55. The documents herein-after mentioned appear in this Journal as follows: opinion of the judges, Dec. 7—73-77; answer of General Assembly to judges, Dec. 13—77-78; message of Governor Edwards to Assembly, Dec. 12—79-89. The first and third of these documents are also in the Journal of the House of Representatives (MS), 91-95, 95-110. Public interest is attested by the fact that they were printed for the Territory in a pamphlet of 45 pages (150 copies, 12 for the Territory's delegate in Congress); this contains the law of Dec. 13, 1814—pp. 3-11; the judges' opinion—12-20; the Assembly's answer—21; the Governor's address to the Assembly—22-41; letter of Robert Morrison, clerk of the General Court, to the Assembly, Dec. 20—42; and the memorial of the Assembly to Congress (actually of Dec. 21 but in this print undated)—42-45. This last document is accessible in E. B. Washburne, ed., *The Edwards*

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Against this enactment of 1814 (or, rather, to the bill before its passage) the territorial judges—having desired to express an opinion and the Assembly having invited them to do so—made a strong protest.¹³⁹ It would have been perhaps more logical for them to have taken this position against the act of 1813. In fact they had done so, but the matter had been compromised and not brought before the public. Their first objection was to the renaming of the Court; but that would seem quite unimportant.¹⁴⁰ The second was that the bill contemplated courts of two grades, both of which could not be identified with the General Court; “and an appeal from the same court to the same is a solecism,” said they, “which we do not suppose to be the intention of this bill.” After all, as respects the solecism, under the English *nisi prius* system (with some American analogies) the judges on circuit were part of the King’s Bench, and their errors and injustices were both *controllable* (though not by appeal) by the Court

Papers (Chicago Historical Society’s *Collection*, vol. 3, 1884), 401. There was also a print of 24 copies in 3 columns. And finally, Governor Edwards’ message, with full references merely to the counterarguments of Judges Thomas and Sprigg, is printed in N. W. Edwards, *History of Illinois, from 1778 to 1833; and Life and Times of Ninian Edwards* (1870), ch. 5.

The text judged by Dr. Carter to be most authoritative will be printed by him, I assume, in volume 17 of the *Territorial Papers*. My own notes were taken years ago from the 3-column print struck off by order of the Assembly, and it seems useless in most cases to give any citations except to the Edwards biography.

¹³⁹ The law was approved on Dec. 13. None of the statutes of 1814 (or 1813) was printed at the time except this one of Dec. 13, 1814. See Philbrick, *Pope’s Digest, 1815* (I.H.C. 28), 1: xxi n. 3.

¹⁴⁰ Though the Southwest Territory had the Ordinance of 1787 as its organic act, the Court seems always to have been called in official correspondence (whatever may be true of its records, unknown to me) the “superior court”—Carter, *Territorial Papers*, 4: 45, 80, 83, 351, 452; and in Mississippi Territory at least one of the judges always wrote of it as the “superior” or “supreme court”—*ibid.* 5: 360, 373, 374; in Orleans Territory it was officially named “superior court” by Congress—*ibid.* 9: 205; in the Louisiana-Missouri Territory it was given no name—*ibid.* 13: 93, 100, 156, 490; and in Michigan Territory, which was a part for eighteen years of the Northwest or Indiana Territory, the territorial legislators promptly changed the name to “supreme court” in 1805—W. W. Blume, *Supreme Court of Michigan Territory*, 5: xxiii, 1: 9.

Governor Edwards, in his reply to the judges, pointed out that Congress had used the phrase “supreme or superior Judges” (see Carter, *Territorial Papers*, 2: 396), and that the laws of the Northwest Territory, Indiana and Illinois territories contained many references to “a Supreme Court” (which they did, no doubt both with and without initial capitals). He also argued that the Ordinance did not use “General Court” as a proper name; that as such the name came only from statutes of the Northwest Territory, and the Illinois legislature of the second grade had full power, by provision of the Ordinance, to alter it.

in bank. The illogicality has always been admitted. As Governor Edwards said in his reply to the judges, to give a court both original and final jurisdiction "is neither very perfect nor very usual," but there were times and places when nothing else was practicable, and the only question presented by the legislature's action was whether it violated the Ordinance. The precedents for it in this country were on every hand.¹⁴¹

The judges' second proposition above stated was sound enough in fact. If, however, there was anyone in Congress who had paid any attention to developments in the territories he would have known that the bill in question represented a general tendency in the territories—and, indeed, a colonial tendency. Judge Sprigg, too, had served on the Supreme Court of Ohio, in Michigan Territory, and Orleans Territory; Judge Thomas should certainly have had some knowledge of Indiana development. Governor Edwards in his comments upon the judges' objections recalled that in the Northwest Territory the territorial judges had been similarly required to sit in different places and capacities—in the General Court, in circuit courts in the counties, and in courts of oyer and terminer; and Congress had provided pay for such duties. And so in Indiana Territory. And Judge Thomas had joined, in 1809, in requiring the Illinois judges to sit in the common pleas—a regulation differing very seriously in character from all the others. The General Assembly, therefore, had not innovated.¹⁴²

But suppose it had. Still, the Governor contended, the legislature might properly do so, for the Ordinance left it free to act. It provided merely for a court with common law jurisdiction. "But *how*, *when*, or *where*, that jurisdiction is to be exercised is not pointed out, and therefore it is subject to the modification and direction of the territorial legislature";—otherwise three judges alone must exercise *all* jurisdiction. He thought it "evident . . . that congress intended merely to appoint and pay the Judges, leaving it to the territorial legislature to adopt, or form such a Judiciary system, as they might conceive would be most conducive to the public interest—for if congress had intended to perfect the establishment and organization of the court, it is fairly to be presumed they would have been more explicit upon the subject."¹⁴³

¹⁴¹ N. W. Edwards, *History of Illinois*, 33-35.

¹⁴² *Ibid.* 31-32.

¹⁴³ *Ibid.* 28-30.

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That being so, "Many of the states," the Governor continued, "had judiciary systems equally as liable to the objections of the judges as the one under consideration, and several of them had such as were very analogous to it. Could not the Governor and Judges have adopted any of them?"¹⁴⁴ And clearly what they could have adopted, the judges could properly execute. And now the representative legislature was even freer to choose what was best suited to the Territory.

"The court established by the ordinance," the judges said, "cannot be subject to the revision or control of any tribunal established by the Territorial Legislature"—or by the legislature itself, they implied. And so, indeed, it might well seem, if one did not know that Congress, after renouncing to the national executive department¹⁴⁵ much of its absolute powers of supervision over the territories, had also for years been ignoring territorial legislative encroachments.

"Neither are we prepared to admit," said the judges, "that the general court can be so localized as to be reduced entirely to a county court, tho' Supreme within the county." But the whole history of the *nisi prius* system contradicted, in substance though not in form, the implied opinion of the judges; and moreover, as already pointed out, Congress had already provided for territorial judges, with jurisdiction coextensive with a territory, and yet residing in and serving exclusively, for years, a single district¹⁴⁶—although as large, to be sure, as many a present state. Nor could they see (and they argued *this* point at much length) how one court could have more than one clerk;¹⁴⁷ although since to name a clerk was a power that was inherent in the court as a means of best serving the Territory it seems jejune casuistry to deny the power to name a clerk in each county if so many be required by the end stated.

¹⁴⁴ *Ibid.* 30-31.

¹⁴⁵ *Post* at cccxc seq.

¹⁴⁶ *Ante* at notecall 119. See also Blume, *Supreme Court of Michigan Territory*, 5: xxx on a Michigan instance after 1820. There were many such later.

¹⁴⁷ Governor Edwards replied at equal length—N. W. Edwards, *History of Illinois*, 36-41. According to him, members of the Assembly understood that the judges, despite their objections, would not refuse to execute the law if passed—*ibid.* 86; but from a letter of Jan. 2, 1815 to ——— (Nat. Arch.: State Dept., Territorial Papers, Illinois) it appears that they later decided not to do so. The act provided for appointment by the governor of the clerks of the Court; the judges forbore to discuss the question whether the right to do so was in the Court or, by a provision of the Ordinance, in the governor—see *post* cccclxvii-viii.

There was some earlier history of these difficulties revealed by Governor Edwards in a letter. When the General Assembly proposed to establish a court of chancery in 1812, to be held by the territorial judges, they refused to execute it "because there was a separate clerk for the chancery causes, & because it was called a chancery court—but at the session of 1813 they proposed that if the legislature would vest those chancery powers in their court by the style that had before been given to it, that they would execute the law and perform the duties, which it enjoined."¹⁴⁸ To this the General Assembly agreed, the law went into effect,¹⁴⁹ and the difficulties ended. These past disagreements explain the tenacity with which resistance was made in 1814.

The arguments of the judges and of Governor Edwards went forward to Congress together, and the result was the passage of an act by that body which amounted to a re-enactment, with slight alterations, of the territorial law.¹⁵⁰ Some things were openly provided which in the territorial act were not said out of consideration for the judges; in particular the courts to be held in the counties were openly "styled circuit courts for the counties," and what the original act called "the Supreme Court" was called in the federal act "the court of Appeals." As respected the clerks, the legislature's view prevailed as to number—one in each county; but Congress made them appointable by the circuit courts, and *another* clerk of the Court of Appeals was provided for, appointable by it. Power was given to the legisla-

¹⁴⁸ Letter of Jan. 2, 1815 cited in last note.

¹⁴⁹ See the act cited *ante* n. 128. That act was entitled: "An Act Regulating the General Court."

¹⁵⁰ Act of March 3, 1815—*U. S. Stat. at Large*, 3: 237. It is also printed in *Pope's Digest, 1815* (*I.H.C.* 30), 2: xvii-xxii. Compare this with the territorial law of Dec. 10, 1813—*ibid.* 312-33 (some sections omitted) or *post* 98-108 (in full). In J. M. Palmer, *The Bench and Bar of Illinois* (2 vol. 1899), 1: 10, the opinion is expressed that the arguments of the judges "were unanswerable."

In A. Davidson and B. Stuvé, *A Complete History of Illinois from 1673 to 1884* (1884), 288, it is stated that inasmuch as the General Assembly had abolished by one act the court of common pleas (acts of Dec. 19 and 24 relative to county courts—*post* 149, 169), and by another act (the act of Dec. 22, 1814, *post* 160) had abolished the General Court, the Territory was left, "until congress . . . acted, . . . without a judicial tribunal higher than that of a justice's court." Now, in the first place this assumes that an act (the last just cited) which was supplemental to the disputed act to establish a Supreme Court and contained provisions dependent on that, could be valid while the main act was invalid. But the assumption that the main act was invalid is another complete mistake—see *post* ccccxli, ccccxliii.

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ture to alter the times of holding the courts, but "not . . . to increase the number of sessions." And it was provided that no judge appointed under authority of the territory should "be associated with the . . . United States' judges when sitting as circuit judges."¹⁵¹ The Assembly had attempted to provide for the attendance of two judges in some criminal cases in the circuit courts, without positively requiring it; Congress omitted this. In both acts at least two judges were required to hold the highest court.

"The real intention of the Legislature," they stated in their memorial to Congress, "was that each Judge should have a circuit . . . in which he should take original jurisdiction of all causes arising therein and that the three Judges or a majority of them should constitute a Court of appeals . . . to revise and correct . . . the decisions of Circuit Courts and all other inferior tribunals." All this the federal act allowed, and in the terminology as here stated by them.

The federal act did not state how long it should remain in force; much less declare the territorial legislature competent to regulate the Court in the future. By a law of April 29, 1816, however, it was provided that the former act should remain in force only until the end of the next territorial legislature, which thereafter should have power to organize as it desired the judicial system of the Territory.¹⁵² Before that statute was passed two additional laws had been enacted by the territorial Assembly dealing with the circuit and appellate courts, though they contained nothing inconsistent with the federal act, and one contained a caveat that no construction should be put upon it repugnant to that act.¹⁵³ After passage of the second federal act the

¹⁵¹ This practice had for years been common practice in all the territories of the Old Northwest in commissions for courts of oyer and terminer, and probably elsewhere. Examples are found in Carter, *Territorial Papers*, 3: 508, 509, 529. See Philbrick, *Laws of Indiana Territory* (I.H.C. 21), cxlv. Mr. Blume reports the practice in Michigan—W. W. Blume, *Supreme Court of Michigan Territory*, 5: xx. The interchange of officers, especially judges, between the early territories would have been likely to spread the practice. The practice had been forbidden in Indiana Territory by a federal statute of Feb. 24, 1815—*U. S. Stat. at Large*, 3: 213. It was doubtless a common practice in many states, being obviously desirable in order to give guidance and authority to local tribunals. So, for example, in New York, New Jersey, and Pennsylvania—R. Pound, *Organization of Courts*, 144-45.

¹⁵² 14 Cong. 1 Sess. ch. cliv, *U. S. Stat. at Large*, 3: 327.

¹⁵³ Law of Jan. 9, 1816, "Explaining the Jurisdiction of the Circuit Courts"—*post* 203; and the other, of the same date, "Concerning the Court of Appeals for Illinois Territory and the several circuit courts"—*post* 207.

Assembly again made its annual revision,¹⁵⁴ and did increase the number of sessions on circuit required annually of the judges.¹⁵⁵

The act passed by Congress for reorganization of the Illinois judiciary marked a stage in the history of territorial courts. On the same day that the Illinois legislature was authorized to regulate independently the judicial system of the Territory

the general assembly of Missouri was ordered [authorized] to establish a system of circuit and appellate courts similar to that of Illinois.¹⁵⁶ In Missouri and also in Indiana the superior [territorial] judges were given chancery powers in all civil cases.¹⁵⁷ When the Territory of Alabama was cut off from Mississippi and Arkansas from Missouri in each case the judiciary was organized on the principles established in 1815 for Illinois.¹⁵⁸ From this time on the legislation of Congress was either direct, and based on these general principles, or gave free hand to legislation by the territorial legislatures. The whole incident suggests that federal legislation would have been infinitely less haphazard from the beginning if there had been any means of centering *attention* of Congress on territorial problems.

¹⁵⁴ Act of Jan. 6, 1817, "regulating and defining the duties of the United States' Judges for the Territory of Illinois"—*post* 256; and act of Jan. 10 supplemental to the preceding—*post* 263.

¹⁵⁵ Both the acts of 1816 cited *ante* n. 153 and the present acts contained some matter that was in the law of Dec. 10, 1814 and not included in the federal act of March 3, 1815. This seems unimportant. *New* clerks of all circuits and of the court of appeals were appointable under this new act of 1817, and no changes were made in the clerks' powers or duties. Perhaps these appointments had some special significance—possibly political.

¹⁵⁶ By act of April 29, 1816—14 Cong. 1 Sess. ch. clv, *U. S. Stat. at Large*, 3: 328. The lower jurisdictional limit for the circuit courts was different in two cases—over \$100 in Missouri, over \$20 in Illinois.

¹⁵⁷ The Indiana "superior" court (General Court) only, by sec. 6 of act cited *ante* n. 152; both "superior" and "circuit" courts in Missouri by sec. 3 of act cited *ante* n. 156.

¹⁵⁸ M. Farrand, *Legislation for the Territories*, 29. The quotation is introduced primarily for the purpose of paying tribute to the admirable character of Dr. Farrand's thesis. He gives only dates of statutes, but with very rare exceptions the date is enough to lead one quickly to the statute. (In at least one case one must search through nearly two hundred pages of legislation, but this shows how thorough was Dr. Farrand's reading.) By sec. 5 of the organic act of March 2, 1819 for Arkansas the governor and judges were given "power to pass any law for the administration of justice in said territory, which shall not be repugnant to this act or inconsistent with the constitution"—*U. S. Stat. at Large*, 3: 494. The first stage of government was to end whenever the governor should be satisfied that such was the desire of a majority of the freeholders, and thereafter the elective legislature was to have "all the legislative power of the territory"—hence the above (sec. 6, p. 494). Alabama had been given outright by act of April 20, 1818—sec. 3, *U. S. Stat. at Large*, 3: 372—essentially the Illinois system.

SECTION II

THE LEGAL BASIS OF THE TERRITORIAL SYSTEM

POWER TO ACQUIRE TERRITORY, POWER TO ESTABLISH GOVERNMENTS, ADMISSION AND EQUALITY OF STATES

The tradition has been strong in our history that a territory should not—perhaps cannot—be held as such under permanent control of Congress, but should be admitted both certainly and soon into the Union as a state. Up to the present day, too, our practice has conformed to this tradition, with the notable qualification that the admission of some territories has been far from prompt. The tradition undoubtedly sprang from our colonial experience, but it has never had any legal basis, since it was given no recognition in the Articles of Confederation or in the Constitution.

Even the acquisition of territory by the federal Union was not mentioned in either document, although implied powers ample for the acquisition of *foreign* territory are readily found in the Constitution. *Domestic* lands of vast extent were acquired by the Confederation; indeed, its legal establishment was made possible only by the certainty of their acquisition. Whether they were acquired under a power given Congress by implied amendment of the Articles or by mere usurpation of power will be discussed below.

Nor was there in the Articles any mention of the government of settlers in territories acquired. Governments were nevertheless established by the Confederation over the settlers on the lands it acquired; yet the word “territories,” in a technical political sense, is also not to be found in the Articles.

It is also true that the disposal of the Confederation lands and the government of settlers thereon were vitally involved in the creation of the present Union. Yet in the Constitution, also, the word “territories” does not occur; the sole reference to “territory” is seemingly made to it merely as “property” of the United States. Perhaps the power to “make all needful rules and regulations respecting the territory or other property of the United States” was not intended as a grant of power to govern settlers in territories. If so intended, perhaps it was intended as such only as respected territories already acquired; perhaps it was intended to give power, also, to govern those

in territory later to be acquired. These matters will be discussed below, and the latter interpretation supported.

In consequence of these facts and obscurities the fundamental characteristics of the relation between Union and territories have been matters of growth, and therefore their origins have been disputable and their precise nature at any given time has been uncertain. No one who reads the proceedings of the old Congress, or even the mere text of the Ordinance of 1787, can fail to note the vague use therein of the words "territories" and "states." No one can read the Constitution without noting the equally vague employment therein of the latter word¹ and the complete absence of the former.

I

The foregoing matters underlie two fundamental questions relating to our governmental system. Both of them are implicit in the brief constitutional provision that "new states may be admitted by the Congress" into the Union.

The first question is: Did (or does) the "may" imply a discretion to refuse to an organized political community, within the Union's domains and governed by it (under the title of territory, state, or any other name), for an indefinitely long time or even altogether the statehood which attaches to membership in the Union?

The second question is: What is the meaning of the word "states" in the constitutional provision just quoted? Clearly a state (using that word in the sense of political science, as a people politically organized) may exist outside the Union. By the Declaration of

¹ "In the Constitution the term state most frequently expresses the combined idea . . . of people, territory, and government. A state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such states, under a common constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States. . . . But it is also used in its geographical sense, as, in the clauses which require that a representative in Congress shall be an inhabitant of the State in which he shall be chosen, and that the trial of crimes shall be held within the State where committed. And there are instances in which the principal sense of the word seems to be that . . . of a people or community, as distinguished from a government. In this latter sense the word seems to be used in the clause which provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion" —*Texas v. White* (1868), 73 U. S. 700, 721. See *post* n. 37 of Sec. III.

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Independence the united colonies declared themselves to be free and independent states; and such, in the sense stated, they of course were thenceforth. Later, Maryland remained outside the nominal Confederation until her accession gave it legal status; Vermont remained thereafter outside both the Confederation and the present Union; and Virginia, New York, North Carolina, and Rhode Island remained for lesser times outside the present Union from its establishment, by ratification of the Constitution by nine states, until their respective ratifications during a period of twenty-three months thereafter. Such states might be, as they were, admitted—although the existence of constitutional authority to admit a “foreign” state was denied by John Quincy Adams and others when Texas was annexed. But such a state would by admission become a state in a new and special sense defined by the attributes which the Constitution assigns to it as a member of the federal system.

In view of these facts another question arises. Congress having provided a substantially invariant territorial system, as respected the relations between territory and Union and admission to the latter as a Union-state, to what extent has it been recognized as politically permissible for a territorial population, *independently* of congressional action, to organize itself as a “state” in a sense implying some relation to the Union intermediate between the status of a territory and that of a Union-state? In view of the complete authority vested in Congress, this question necessarily involves no question of right but merely the political discretion of Congress. For a long time, however, it was involved with theories of natural right or “squatter sovereignty.”

None of the above questions can be positively answered, either as matters of law or of political theory. It is self-evident that they are primarily not legal, but questions of political life; of tradition on one hand and of the forces shaping national development on the other. They are questions to which the Supreme Court will certainly never, unless under necessity, attempt to give an answer; and to which there can never by possibility be political answers other than those indicated by the actions of successive Congresses. Not, then, with the idea of seeking answers to them that have any supposed theoretical finality, but for other reasons, it seems worthwhile to devote some attention to them.

A main reason is that they have underlain the territorial growth of the country in the sense that answers to them have necessarily been implicit in the acts by which that growth was effected, even though one might hesitate to say that answers consciously or unconsciously given to them motivated or determined those acts. Nevertheless, these rather abstract questions will be considered only briefly, and after full discussion of other questions of less abstract character.

In particular, these concrete questions may be asked. (1) Why did the Articles of Confederation make no reference to the acquisition of territory, government of settlers therein, and admission of new states; and (2) did the Confederation nevertheless acquire power to do these things? (3) Why did the Constitution explicitly provide merely that Congress "may" admit new states; and only vaguely for territorial government; and only by implication, if at all (and it is thought not at all), for the acquisition of domestic territory?

The answers to even these relatively narrow questions, capable of examination through ponderable evidence, can only be found in the history of the Confederation era, and in it only as tentative inferences. An attempt will be made to answer them as definitely as the sources of the time permit, after which recurrence will be made briefly to the more abstract questions above stated, any thorough discussion of the latter being irrelevant to the history of the Old Northwest.

II

The almost complete absence of reference, in both the Articles of Confederation and the Constitution, to the acquisition of foreign territory is very easily understood. The provision in the Articles of Confederation for the admission of Quebec,² even assuming that completely voluntary action on her part was not envisaged,³ was excusable as incidental to an existing war with the suzerain of that province; but any similar provision in the peacetime Constitution of a Union of erstwhile rebellious colonies would have been an international impropriety, an irritating threat added to the challenge which the mere existence of our republic offered to European monarchies.

As respects the absence in both instruments of references to the

² Art. 9.

³ But see J. H. Smith, *Our Struggle for the Fourteenth Colony* (1907).

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acquisition of domestic lands—that is, within the boundaries of individual colonies—explanations can be given which are both brief and seemingly simple. One can say that in law the individual states were *colonies* until they should attain independence, and therefore should not be conceded, retrospectively, to have owned the lands in question; at least, and particularly, after the Crown had asserted its paramount control over all those lands, without reference to individual colonial limits, by its proclamation of 1763. And one can then add that since the “United States” referred to in the Articles were not a political entity, but merely the states united in the enterprise of winning independence for the states severally, there could have been no thought of acquisition by them *collectively* of lands within their individual limits.

The difficulty with the above statements, however, is that each is contradictory of notorious facts. It is a fact, namely, that all the colonies did claim individual legal ownership of lands within their limits. Free grants of such land had been used both to attract immigration from and to check emigration to other colonies.⁴ The boundaries of some colonies were limited and precise; those of others involved conflicts, or ran vaguely to the Mississippi or even to the South Sea. It was the claims of these colonies that almost prevented union under the Confederation. Virginia had made great disbursements, some of them assented to by the King, for defense of territory west of the Alleghenies; had organized counties there and held courts therein; had granted lands there to her troops and to others; had passed in 1753 for encouragement of settlement on the Mississippi an act which was assented to by the Crown.⁵ One of Maryland's rather

⁴ H. Tatter, “State and Federal Land Policy during the Confederation Period” (1935), *Agricultural History*, 9: 176, 180; also “Preferential Treatment of the Actual Settler . . . to 1841” in *Summaries of Ph.D. Dissertations*, 1933.

⁵ June, 1779—*Journals of the Continental Congress, 1774-1789*, 23: 505-6. These facts are chosen to illustrate Virginia's claim because they were those chosen by the committee which assembled “facts and observations” for consideration by our envoys to the peace conference. Virginia created in 1738 Augusta County, west of the Alleghenies and bounded on the north and west by “the utmost limits of Virginia”—W. W. Hening, *Statutes*, 5: 79. The County of Illinois was only a bit of this vast region, from Dec. 1778 to Jan. 1782—see A. C. Boggess, *The Settlement of Illinois, 1778-1830* (1908), 9, for citations. Many details of Virginia's vast land grants in the West are given in T. P. Abernethy, *Three Virginia Frontiers* (1940), 57, 65, 67. Following 1763 schemes were considered by the British government for creating

effective weapons in her duel with Virginia to secure for the benefit of all the states the latter's western territories was the charge that a sale of these at low prices would depopulate and impoverish the states lacking similar lands.⁶

On the other hand it is a fact that there *was* thought of collective *disposal* of the lands, at least from the moment that Silas Deane first suggested in 1776 that they should be used to pay the costs of the war for independence.⁷ That was two years before the Articles of Confederation were even written. Moreover, the idea that the states collectively had the right so to dispose of the lands very soon became common and significant. As a matter of justice it was based on the argument that title should be recognized as in—or should be ceded to—the states collectively because only by their united efforts could independence be won. It was based, technically (at first and most reasonably), on the theory that legal title was in the Crown, at least after 1763, and would necessarily pass by the treaty of peace to the collective colonies who would be a party to it. As a matter of fact, even while title to the lands, in Crown or colonies, was unestablished against France, the Crown had asserted paramount dominion; for example in ordering certain grants to be made by Virginia's governor of western lands "within his Majesty's colony of Virginia."⁸ The instructions prepared for our representatives in negotiating peace in 1783 did not challenge the Crown's right, even if title were in the individual colonies, to terminate or shift it by "dismemberment" of colonies;⁹ and though the British cabinet had merely considered plans for new western colonies, or for the sale of great tracts to private companies,¹⁰ these did illustrate its paramount claims. Finally, the lands were within the boundaries of the cession by France in 1763 to Great Britain; which thereafter, as already stated, dealt with them as a

colonies filling the whole region west and northwest of the Alleghenies, and Virginia, at least as to some, made no protest—see G. E. Howard, *Preliminaries of the Revolution* (1905), 233.

⁶ May 20, 1779—*Jour. Cont. Cong.* 23: 505-6.

⁷ Dec. 1, 1776—*American Archives, Fifth Series*, 3: 1020-21, 1051. Congress had in fact offered land bounties to soldiers in August and September of the same year—as noted in J. A. Barrett, *The Evolution of the Ordinance of 1787, with an Account of the Earlier Plans for the Government of the Northwest Territory* (1891), 4 n. 1.

⁸ *Jour. Cont. Cong.* 23: 505.

⁹ *Ibid.*

¹⁰ See *post* n. 267.

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whole as regarded Indian rights and prohibition of settlement by whites therein.¹¹

But, admitting all this, the question would still remain: Was the western country ceded to the states severally or collectively? The treaty of peace sometimes referred to them as constituting together one party, and—for the purpose of making peace in a general sense—such, of course, they were. On the other hand the treaty recognized their independence individually, and in other language spoke of them in a manner consistent with their being several, though allied, opponents. Not much, if anything, therefore, can be learned from the treaty. And beyond such frail arguments lay the facts that Virginia, in particular, not only had claimed rights in the Northwest as a colony, but during the war had individually conquered, and in a feeble way governed, a part of it.

In the official papers of the Confederation the theory of colony title—or at least state title—was naturally and particularly favored. Naturally, because the growth of continental sentiment was necessarily slow; and particularly because collective ownership was a theory that could not be favored in an assemblage of state delegates. Among them, the fact of Virginia's actual occupation of part of the West, although hostile to the claims of the other landed states in the matter of extent, gave support to them in matter of legal theory; and this group of states long controlled the collective expressions of Congress. Edmund Randolph, for example, compiled the "Facts and Observations" for consideration by our peace commissioners that were sub-

¹¹ The committee argument prepared for our peace commissioners emphasized *state* claims—*post* n. 73. They remarked of the alleged abridgment of colonial boundaries by the Quebec Act (1774): "But the provision, that nothing contained therein should in any wise affect the boundaries of any other colony, destroys its operation"—*Jour. Cont. Cong.* 23: 511. The question of boundary was not, however, identical with the question of title, in which we are here interested; the argument conceded by implication that Britain might have altered boundaries and area of colonies. The committee also denied the right of the Crown to abridge Virginia's right—*ibid.* 510; but if title had always been in the Crown there was no such abridgment. See also *ibid.* 495. Max Farrand stated the argument as being that "the Proclamation . . . had changed this western territory into 'Crown Lands'"—*The Fathers of the Constitution* (1921), 57. So long as Virginia was a colony it would seem that legal argument either way—that title was always in the Crown, or was in 1763 resumed by the Crown—supported the view that title passed from it; but to whom? Dr. Jameson adopted the view that "all the vast domains of the Crown fell into the hands of the states," severally—J. F. Jameson, *The American Revolution Considered as a Social Movement* (1926), 49.

mitted to Congress in August 1782, and which were founded on the theory of state title.¹² Madison, for an earlier example, in drafting instructions to Jay in October 1780, simply assumed the theory that British title devolved on the states severally;¹³ it was not, to be sure, a point that could be argued with France or Spain. Yet this report was approved only one week later than a day which is one of the greatest in the history of American nationalism—October 10, 1780; the day on which Congress committed the Confederation, morally, to a national colonial policy in the West—and Madison had seconded the motion that led to that momentous step.¹⁴ When a petition from Kentucky inhabitants who alleged prior allegiance to “the United States” was presented in August 1782 to Congress—instead of to Virginia’s legislature—a great debate in Congress showed how strongly the tide was running in favor of continental unity.¹⁵

¹² This report was preceded by one of Madison (*Jour. Cont. Cong.* 23: 481 n. 1) which discussed the proclamation of 1763, the treaty of New York in 1768 with the Six Nations, and the Quebec Act of 1774—*ibid.* 473-76. This was referred to another committee, the report of which was prepared by Randolph—*ibid.* 521 n. In reading the report it is essential to bear in mind facts pointed out *post* at notecall 73. It discusses the above points at 495, 507-11. Succession to colonial titles by the states severally is discussed at 511-16; by the united states collectively, at 516-17.

In recognizing as alternative the claims that title was in the states individually or collectively they gave precedence of order to the former, and the argument for collective title is brief and weak. On the legal points, the Committee said that they did not attempt to *prove* that Virginia, North Carolina, and South Carolina were “lawful successors to the rights of the proprietors,” but did “assume” that the colonial governments had necessarily exercised “jurisdiction” over the western lands “even if the proprietors had a right to throw them off from that jurisdiction.” This latter, they also assumed, could only be effected by “dismemberment” of a colony, and they denied any right of the proprietors to “dismember” a colony without consent of its “people”—*Jour. Cont. Cong.* 23: 498. No change of boundary or division of a colony ever having been attempted, this last opinion was both political and of scant significance.

The report was recommitted—*ibid.* 524 n. 1; and no further proceedings on it are indicated; but it seems to have been adopted—*ibid.* 485 n. 2.

¹³ *Ibid.* 18: 935-47, especially at 939-40. This report was also recommitted.

¹⁴ The declaration of Oct. 10 was a resolve of Congress that any “unappropriated lands . . . ceded or relinquished to the United States, by any particular states . . . shall be . . . settled and formed into distinct republican states, which shall become members of the federal union, and have the same rights of sovereignty, freedom and independence, as the other states”—*ibid.* 915. On Madison’s motion compare *post* at notecall 53.

¹⁵ These debates are to be found in the Thomson Papers, New York Historical Society *Collections*, 1878, at 145-50; they are also quoted liberally by President Welling—J. C. Welling, “The States’-Rights Conflict over the Public Lands,” (1888) *American Historical Association Papers*, 3: 419-22. The debate had begun on Aug. 16, on a motion by Bland, of Virginia, to

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Theory aside, facts had in the beginning favored Virginia; theory aside, they were coming more and more—in the form, to be sure, of a growing continental sentiment—to favor the theory of collective title.

Back of these disputes lay, of course, economic interests. As the Revolution progressed all the states became debt burdened and great obligations were contracted by the Confederation; the rivalry between the old practice of free grants and the later practice of sales for revenue was clearly ending in favor of the latter, which had made rapid headway in the decades just preceding the Revolution;¹⁶ and in consequence of these facts the control of the land of Virginia and other states with great western claims—the questions, who should control them and for what purpose—became the most momentous problem of the Confederation era.¹⁷ Not having been solved, however, when the Articles of Confederation were drafted, its immense economic importance and divisive political potentialities precluded reference to it therein; and the absence of settlement speedily appeared as the greatest obstacle to the adoption of the Articles and legal establishment of the Confederation. The states of definitely limited boundaries—the “little” or “landless” states—supported the claim of the Confederation to the transmontane territories claimed by the “landed” states. Thus arose a conflict between the big and little states which runs through the records of the Continental Congress and which forced the most vital compromises of the Federal Convention. It will be found, too, that it was the violence of these differences that prevented explicit reference in the Constitution to the acquisition and government of territories.

Various historians—recently and notably Mr. Jensen—have told in detail the story of the relation between the problem of western

expunge the *Question*, stated by the committee, of possible title in the states collectively (see *post* n. 73)—and so, also, its subsequent brief discussion, *ibid.* 141-45. To avoid arguing the whole of what was compiled merely as information, not as instructions, the report was committed. Its later fate does not appear.

¹⁶ Tatter, *ante* n. 4 (first item). “The principle of public vendue as opposed to private sale arose from the practice in New England and New York (*Conn. Col. Recs.*, VIII, 134-137; *N. Y. LAWS*, 1792, Greenleaf ed., II, 334). British royal instructions of 1774 to Governor Tryon of New York are similar (*Docs. rel. Col. Hist. State N. Y.*, VIII, 410-412)”—C. E. Carter, ed., *The Territorial Papers of the United States* (1934—), 2: 15 n. 32.

¹⁷ The important literature is cited in M. Jensen, *The Articles of Confederation* (1940), particularly ch. 6, 10, 11. In the following pages nothing else is cited, with few exceptions, than primary sources.

land claims and the ratification of the Articles. Reference to the matter will here be confined to the question of *the legality or illegality of the actions of Congress* in acquiring territory, organizing governments therein, and providing for the admission of new states. It is impossible to deal with this question without restating many facts that are familiar to students of the Confederation era. Their restatement with reference to the specific inquiry here propounded emphasizes the order of their occurrence and throws light upon the significance of that order.

The question stated has more novelty to non-lawyers than to lawyers; for the law, in various situations in which justice so demands, is accustomed to make many acts legally effective by a bald fiction of "relation back," or by blandly reciting as a "reason" the mere result—*ut res magis valeat quam pereat*.¹⁸ And it might be thought that that view would be sensible and sufficient in cases involving the acts of governments, where public policy is most plainly present. From that point of view, there is nothing "practical" in an inquiry into the "legality" of the acts of the old Congress, either as respects all its acts preceding the *de jure* establishment of the Confederation, or as respects solely its acts with reference to the western land claims of the states both before and after the Confederation's legal establishment. These seeming legal analogies will be found, however, to give no aid in the present inquiry.

Nor is it one of useless antiquarianism. The effect of the actions of the old Congress upon ratification by the states of the Articles of Confederation is an old story. Wholly different, however, are the two questions: (1) Were the defects of the Articles cured by an amendment implicit in the actions and the ratifications just referred to? and, (2) What relation is there between the answer to the preceding question and the phraseology of the present Constitution? It is to these questions that the present discussion is addressed. On some of the details which it involves variant views have been expressed by the Supreme Court, and views that are by no means historically acceptable.

The Dickinson draft of the Articles gave to Congress the powers of limiting the boundaries of states extending to the "South Sea, and ascertaining those . . . that appear to be indeterminate"; of "assigning

¹⁸ See *post* n. 101.

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Territories for new Colonies, either in lands to be thus separated from Colonies" or theretofore or thereafter purchased from the Indians; of "disposing of all such Lands for the general Benefit of all the United Colonies"; and of "Ascertaining Boundaries to such new Colonies, within which Forms of Government are to be established on the Principles of Liberty." Irreconcilable opinions in the committee from which the draft proceeded were presumably indicated by the note appended to these provisions: "These clauses are submitted to Congress."¹⁹ When a second draft was agreed upon after two months of debate all the above provisions were omitted,²⁰ and in their place it was finally provided "that no state shall be deprived of territory for the benefit of the United States."²¹ This was a victory of the "landed" states. Late in the debate, Maryland—continuing efforts steadily pursued throughout 1776, and with some support gained from other states—forced votes (October 1777) on two amendments. One would have conferred the power to fix state boundaries, joined with a provision for the organization of territory beyond the limits so fixed into "separate and independent states." Both were rejected.²² The result was to remove contention from Congress to the legislatures of the several states when the Articles were submitted to them in final form in November 1777. A year later (December 1778) Maryland adopted a "declaration" that she would ratify only if the landed states should agree that their western lands should be "considered as a common property."²³

¹⁹ Art. 18, *Jour. Cont. Cong.* 5: 550-51, and compare 682. Arts. 14 and 15 were ancillary to the provisions of Art. 18. Art. 14 empowered Congress to ascertain the limits of Indian territorial claims, and provided that purchases from the Indians should be made solely by the United States for their common benefit. Art. 15 provided that "when" the boundaries of any state ("colony") should have been ascertained, then its "jurisdiction" therein should be guaranteed by all the other states. To each of these two Articles there was appended the note: "This Article is submitted to Congress"—*ibid.* 549.

²⁰ The original and the revised draft (agreed to on Aug. 20, 1776) are printed in parallel columns in *ibid.* 5: 674-89.

²¹ The final draft of March 1, 1781—*ibid.* 19: 218. It was also provided in the same that Congress should manage "all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated."—*ibid.* 219. On "legislative right" compare *post* following notecall 76.

²² Oct. 15, 1777—*Jour. Cont. Cong.* 9: 807. On the efforts of the Maryland delegates during 1776 see *ibid.* 5: 505 n. and 6: 946 n., 978 n.

²³ Dec. 15, 1778—Hening, *Statutes*, 10: 549. This "declaration" was read in Congress on Jan. 6, 1779—*Jour. Cont. Cong.* 13: 29—although not there

During the interval between these two manifestations of her intransigence, "ratification" had proceeded in an obscure and disordered manner. Ten states had by April 1778 instructed their delegates to ratify, but their powers, however widely they may have been known to fellow members of Congress, were not officially laid before that body until June, when it appeared that five were in form unconditional²⁴ and one other substantially so.²⁵ However, the delegates of two states holding powers formally unconditional submitted twenty-five amendments,²⁶ and four states whose delegates were only conditionally authorized to ratify moved eleven other amendments.²⁷ None of all these amendments involved the western lands save one of Rhode Island's. That, in language somewhat indefinite, demanded recognition that they were held by collective title.²⁸ Of the three states

printed. The accompanying "instructions" were read in Congress on May 21, 1779 and are there printed—*ibid.* 14: 619-22. Both are in Hening.

²⁴ Those, namely, of Virginia, Dec. 15, 1777 (misdated 1778)—*Jour. Cont. Cong.* 11: 669; South Carolina, Feb. 4-5, 1778—*ibid.* 670; New Hampshire, March 4, 1778—*ibid.* 662; Pennsylvania, March 5, 1778—*ibid.* 669; North Carolina, April 25, 1778—*ibid.* 669.

²⁵ New York. In her powers of Feb. 16, 1778 was the recital, "be it enacted . . . that the said . . . Articles . . . are hereby, fully accepted, received and approved of"; and her delegates were empowered to ratify, "provided . . . that nothing in this Act, or the said Articles . . . shall . . . bind or oblige . . . this State, until the said . . . Articles have been duly ratified . . . by . . . all the said United States, in Congress Assembled." *Ibid.* 11: 665-67. This proviso manifestly applied to every state, whether expressly stated by it or not, as regards both the Articles and the state's individual legislative action.

²⁶ South Caroline proposed twenty-one—*ibid.* 11: 652-56; Pennsylvania, four—*ibid.* 652. The unrepresented state was North Carolina.

²⁷ Connecticut, on Feb. 12, 1778, empowered its delegates "to ratify . . . with such Amendments, if any, as by them, in conjunction with the Delegates of the other States in Congress, shall be thought proper," and proposed two amendments—*ibid.* 11: 665, 639. Rhode Island, on Feb. 18, 1778, authorized ratification "provided the same be acceded to by eight of the other States," and to join in any amendments supported by nine others, and herself proposed three—*ibid.* 663-65, 638-39. Georgia, on Feb. 26, 1778, authorized ratification of the submitted Articles "or any other plan of a general Confederation which shall be agreed upon by nine of the United States," herself proposing three amendments but empowering her delegates to ratify whether "all or none" of these should be adopted; but her delegates reported to Congress, on the day when report of instructions was asked for in that body (June 22), that they were without instructions, her amendments, therefore, not being actually moved—*ibid.* 670, 656. Massachusetts, on March 10, 1778, ordered ratification of the Articles as they were "unless the following alterations, or such as may be proposed by the other States, can be received and adopted without endangering the Union proposed," her own suggested alterations being three in number—*ibid.* 663, 638.

²⁸ Her third proposed amendment was to add to the provision of Dickinson's Art. 18 quoted *ante* preceding notecall 19, these words: "provided never-

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that had not yet given any powers to their delegates—all strongly committed to restriction of western claims—one was unrepresented in Congress, but the delegates of the other two, New Jersey and Maryland, presented instructions on that subject.²⁹ Their restrained phraseology could not, in view of the past, have been regarded as qualifying the militancy of those states. The virtual certainty that the unanimous ratification required for *de jure* establishment of the Confederation could never be obtained without amendment of the Articles was necessarily apparent to all.

Such being the situation as regarded actual powers and demands for amendment, the action of Congress is illuminating. In the first place, no direct and express amendment of the Articles was permitted; for though many of the suggested amendments involved mat-

theless, that all lands within these states, the property of which, before the present war, was vested in the crown of Great Britain, or out of which revenues of quitrents arise, payable to the said crown, shall be deemed, taken and considered as the property of these United States, and be disposed of and appropriated by Congress for the benefit of the whole confederacy, reserving, however, to the states, within whose limits such crown lands may be, the entire and complete jurisdiction thereof." *Ibid.* 11: 639.

With this compare his suggested Arts. 14 and 15 stated *ante* n. 19, and the quotation from New Jersey's proposed amendment in the next note below. The position of Rhode Island and New Jersey was equivalent to Maryland's demand for nationalization of lands "westward of the frontiers of the United States, the property of which was *not vested in individuals* at the commencement of the present war"—resolution referred to *ante* at notecall 22, recited in the later "declaration" cited *ante* n. 23.

²⁹ Maryland's instructions (Dec. 15, 1778) are cited *ante* at notecall 23. In New Jersey's "representation" of June 1778 (1) she insisted that state boundaries should either be at once "finally fixed" or the "principles" be at once established on which they should be fixed "at an early period, not exceeding five years from the final ratification of the confederation." (2) She emphasized that, the war being "for the general defence," expectations had been that the "benefits" of victory should be general, "and that the property of the common enemy . . . would belong to the United States. . . . We are therefore greatly disappointed in finding no provision . . . empowering the Congress to dispose of such property; but especially the vacant and unpatented lands, . . . for public and general purposes. The jurisdiction ought in every instance to belong to the respective states within . . . which such lands may be seated; but . . . the property which existed in the crown . . . ought now to belong . . . in trust for the . . . use and benefit of the United States." When, then, in Art. 9 of the Articles it is declared that "no state shall be deprived of territory for the benefit of the united states," does this refer to "any lands, the property of which was heretofore vested in the crown of Great Britain; or [are we to understand] that no mention of such lands is made in the [Articles of] confederation?"—*ibid.* 11: 649-50, paragraphs 5-6.

"Seated" lands are, technically, those in possession (*seisin*)—presumably, therefore, of individual proprietors.

ters of form that had obvious merit it was evident that a discussion of at least near two-score proposals would be so prolonged as might render impossible establishment of the Union. Various of the states, in the instructions to their delegates, emphasized such establishment as the primary immediate necessity; moreover, it was necessary to give heed in Congress to the demands of the strong party³⁰ who had sought to secure union before any declaration of independence and now, after that, wanted action as speedily as possible. After a motion to empower Congress to fix the western limits of states claiming to the Mississippi or the "South Sea"³¹ was defeated by a narrow margin in June 1778, a *form of ratification*, professedly absolute, was signed for eight states—New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, Virginia, and South Carolina—on July 9. *But the Articles themselves were not signed on that day by any of these eight states*, so far as can be known from their official copy; and were certainly signed by some on very different dates.³²

The distinction seems to be one of great importance. The signing of the "form" seems to have been one only "in principle." To have signed the Articles would clearly have exceeded the powers of Rhode Island's delegates;³³ and signature by those of Massachusetts could have been reconciled with their powers only by assuming (doubtless

³⁰ See ch. 3 and 4 of Mr. Jensen's book, *ante* n. 17.

³¹ On June 23, 1778 the vote on Maryland's motion so to empower Congress (a renewal of the motion rejected on Oct. 15, 1777 referred to *ante* n. 22) was six (New Hampshire, Connecticut, Massachusetts, Virginia, South Carolina, and Georgia) to five (Rhode Island, New Jersey, Pennsylvania, Delaware, Maryland) with New York divided. *Jour. Cont. Cong.* 11: 631-32 (motion), 636-37.

³² On June 25, 1778 a committee was appointed "to prepare the form of a ratification"; it was submitted the next day and is printed in *Jour. Cont. Cong.* 11: 656, 657. It is stated that on July 9, 1778 *this* "ratification of the articles of confederation" was signed by the delegates of eight states named in the text "agreeably to the powers vested in them"—*ibid.* 677. This can only mean "subject to any conditions in the powers vested in them." The official copy of the Articles (as of March 1, 1781) shows signatures as follows: by New Hampshire, Aug. 8, 1778. By Massachusetts, Rhode Island, Connecticut, New York on dates not indicated; but not necessarily the same date, nor necessarily at a later date than New Hampshire's, as shown by the next signatures—by New Jersey, Nov. 26, 1778; followed by Pennsylvania, July 22, 1778; Delaware, Feb. 22, 1779 and May 5, 1779 (but when did the third delegate sign?); Maryland, March 1, 1781; Virginia, undated; North Carolina, July 21, 1778 (but by one or more delegates?); South Carolina, undated; by Georgia, July 24, 1778 (but by one or more delegates?). See *Jour. Cont. Cong.* 19: 222-23.

³³ *Ante* n. 27.

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quite reasonably, as they may have judged in signing the "form" of ratification) that an attempt to secure amendments would "endanger the Union proposed."³⁴

No more can be said than this: that seven states had by July 1778 to some extent pledged ratification, while at least two of these,³⁵ and three of the five who did not on that day "ratify,"³⁶ were nevertheless strongly in favor of securing all western lands to the Confederation. In a letter to all the states, approved the following day, Congress expressed the hope that "patriotism and good sense" would induce them also to ratify, "trusting to future deliberation to make such alterations and amendments as experience may shew to be expedient and just."³⁷ North Carolina and Georgia ratified the same month, New Jersey before the end of the year,³⁸ and Delaware early in 1779.³⁹

However, New Jersey made quite clear in her final instructions to her delegates that she "still viewed as just and reasonable" the amendments earlier submitted by her,⁴⁰ and acceded only "in firm reliance that the candor and justice of the several states will in due time" give effect to them.⁴¹ Moreover, in Maryland's "declaration," already referred to, made late in 1778; she proclaimed that she would acknowledge no responsibility for any part of the war's cost unless and until the seeming guaranty in the Articles of Confederation (Article 9) of the western claims of the landed states should "be explained" (along with Article 3) so as to preclude such guaranty; pronouncing all charter claims to the Mississippi or South Sea "without any solid foundation"; and declaring her resolution to enter the Confederation only if Congress be fully empowered to fix the western limits of states

³⁴ *Ante* n. 27. The proposed Rhode Island amendment quoted *ante* n. 28 having been defeated by a vote of 9 to 1 (*Jour. Cont. Cong.* 11: 339), her delegates might well have shared the opinion attributed to those of Massachusetts, but they were not compelled by their powers to make such decision.

³⁵ Pennsylvania and Rhode Island as shown by their votes on June 23, *ante* n. 31.

³⁶ New Jersey, Delaware, and Maryland; the other two being Georgia and North Carolina.

³⁷ July 10, 1778—*Jour. Cont. Cong.* 11: 681.

³⁸ North Carolina on July 21—*ibid.* 11: 709; Georgia on July 24, *ibid.* 716; New Jersey on Nov. 26—*ibid.* 12: 1162.

³⁹ On Feb. 22, 1779—*ibid.* 13: 186-88, 236.

⁴⁰ *Ante* n. 29.

⁴¹ *Jour. Cont. Cong.* 12: 1162.

so claiming, all lands not therein included (and not privately owned) to be held by the United States for their common benefit.⁴²

Congress, after its vote of June 23, 1778 above detailed,⁴³ sedulously avoided for some time both action *plainly* beyond its powers and votes on motions involving *an issue* as to its powers.⁴⁴ But the facts above stated called with growing insistence for affirmative action, and late in 1779 Congress plainly stepped beyond its powers in referring to a committee for report the petitions of land companies in the Northwest whose titles Virginia had earlier in that year declared void.⁴⁵ Jurisdiction over such a dispute was clearly outside any powers conferred upon Congress, and Virginia so moved, but a vote on that point was evaded. Virginia then moved that the committee be instructed to report upon that issue before reporting on the merits, and this was agreed to. The committee, however, merely reported that they found no distinction between the two matters to justify separate reports, and after thus flouting their instructions proceeded to make the recommendation (which Congress adopted and put into effect by a letter to all the states) that they suspend land sales during continuance of the war. Almost all the "landless" states—Rhode Island, New Jersey, Pennsylvania, and Maryland—voted for the committee reference, as did also Connecticut; and because of New York's position as a "landed" state, it is significant that her delegation was again, as in June 1778, divided. New Hampshire, Massachusetts, and South Carolina joined in the affirmative vote for this recommendation to the states, with New York again divided.⁴⁶

⁴² Dec. 15, 1778—*ante* n. 23—Hening, *Statutes*, 10: 549. In the accompanying "instructions" of the same date to the delegates the General Assembly declared that the lands, once common property, should be held "subject to be parcelled out by congress into free, convenient and independent governments"—*ibid.* 555.

⁴³ *Ante* n. 31.

⁴⁴ After Maryland's motion of June 22, 1778 was rejected, both Rhode Island and New Jersey made equivalent motions, and votes in the negative were given—but all amendments were rejected without reference to merits—*Jour. Cont. Cong.* 11: 639, 649, 651—see nn. 28, 29 *ante*. On May 20, 1779 Virginia moved confederation by all states willing to join without those abstaining—*i.e.* without Maryland; a vote was avoided—*ibid.* 14: 617-18. Further examples are given in the text immediately following.

⁴⁵ On Virginia's action see M. Jensen, *The Articles of Confederation*. 206-9.

⁴⁶ Sept.-Oct. 1779. The facts are all pointed out by Mr. Jensen, *ibid.* 214-15; *Jour. Cont. Cong.* 15: 1064-65, 1155, 1223-24, 1226-30.

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The delegates of North Carolina reported home that the policy of many members of Congress was that of "pursuing such a line of conduct as may be most likely to obtain the main object, namely, that . . . all the unappropriated lands on the Western frontiers . . . may become the common property of the whole"; and Virginia's explanation of the action as due to the "clamours . . . of the discontented States" amounted to the same thing—with the addition, however, of conceding a general opinion (which, being expressed openly in Congress, and somewhat covertly in its letter to the states, could not be denied) that westward migration might weaken the Union during the war.⁴⁷

Probably nobody would challenge a conclusion that Congress was in fact determined to nationalize the western lands. Its opinion that western migration during the war would weaken the Union was heeded by Virginia in enacting a law designed to curb settlement north of the Ohio River.⁴⁸ She then answered the above proceedings of Congress by a "remonstrance" which—after citing that enactment as evidence of her desire to give that body "every satisfaction . . . consistent with the rights . . . of their own commonwealth"—pointed out the indisputable fact that if the northwest territory did not belong to Virginia, although within her charter limits and not within those of any other state, it must be a part of Canada. She therefore reasserted her title to and sovereignty within the same.⁴⁹

But events had moved too far for arguments, however sound, to affect the situation the events had created. The states and their delegates in Congress had had ample time to ponder alternatives, and it is manifest that resolutions had been taken. The question was no longer one of rights but one of public policy. Two months after Virginia's remonstrance the legislature of New York authorized its delegates to cede that state's western lands,⁵⁰ and soon thereafter another

⁴⁷ Oct. 30, 1779—M. Jensen, *op. cit.* 215, cites the delegates' reports; E. C. Burnett, ed., *Letters of Members of the Continental Congress* (1921-1936), 4: 503, 507-8.

⁴⁸ Oct. 1779—Hening, *Statutes*, 10: 159, sec. 3.

⁴⁹ Dec. 14, 1779—*ibid.* 10: 557. But this again confuses the question of boundaries with that of title.

⁵⁰ The New York act authorizing cession was of Feb. 19, 1780; it was read in Congress on March 7, 1780; the deed was executed on March 1, 1781. *Jour. Cont. Cong.* 19: 208-13. Acceptance, however, was not formally given. Under normal conditions, and the generally accepted legal rule, it would have been treated as accepted by implication. For very important reasons that rule was not applicable in this case, and acceptance was actually given only on Oct. 29, 1782—*ibid.* 23: 694. See Carter, *Territorial Papers*,

committee of Congress was directed to consider the latest of Maryland's "instructions," Virginia's "remonstrance," and New York's tendered but pending cession.⁵¹ Their report again brushed aside the merits of the boundary question and proposed that Congress should recommend to all the states that they cede their western lands to the Union. It was approved two months later, on September 6, 1780, without intervening formal consideration.⁵² The delay was presumably utilized in preparing the way for approval and for Virginia's acquiescence.

Immediately after the vote of approval it was moved by Virginia's delegates that "respecting the lands that may be ceded" in pursuance of the foregoing action, they should be "laid out in separate and distinct states"; which was later changed to read, "formed into distinct republican states, which shall become members of the federal union, and have the same rights of sovereignty, freedom and independence, as the other states."⁵³ This was the assurance made to all the states in the letter from Congress of October 10, 1780.

By this declaration Congress was categorically committed, in principle, to the nationalization of the western lands for which Maryland had long contended. It may well have seemed that any contribution by her toward accelerating actual application of that policy could better be made in Congress than by continuing her protestant isolation outside the Confederation—which Virginia had already

2: 3, especially n. 8; the deed is there printed from the original, correcting many errors in the text of the *Journals*, "the most important" of which are "punctuation differences, some fifty in number, most of which are capable of obscuring the meaning."

⁵¹ June 26, 1780—*Jour. Cont. Cong.* 17: 559.

⁵² The report was made on June 30, 1780—*ibid.* 17: 580; was read on July 3—*ibid.* 586; but nothing more was done with it until it was approved on Sept. 6—*ibid.* 806-7.

⁵³ The motion was by Joseph Jones, Madison seconding. The original motion included a provision that any lands ceded by Virginia, North Carolina, and Georgia should be "a common fund for such of the United States as have become or shall become members of the confederation"—*ibid.* 17: 808. The motion was considered on Sept. 18 and Oct. 10 and this thrust at Maryland deleted, the language being changed to read that the lands should be "disposed of for the common benefit of all the United States"—*ibid.* 18: 836, 915. Virginia's resolution of Jan. 2, 1781 offering cession of her lands to the Confederation, still contained the provision in the first form above quoted—Hening, *Statutes*, 10: 564, 566; and was agreed to on Sept. 13, 1783—*Jour. Cont. Cong.* 25: 561, 562; but Maryland was then a member of the Confederation.

See *post* clix-lx.

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sought to make formal if not permanent.⁵⁴ At any rate the action of Congress proved sufficient to satisfy her. Her delegates were accordingly instructed to ratify the long-pending Articles, and did so on the first of March, 1781.⁵⁵ The final instructions to them reiterated, indeed, her resolute adherence to old demands,⁵⁶ but that was a matter of habit, or perhaps a gesture of victory, and not a necessity. Indeed, a month before the Maryland instructions, Virginia had shown her devotion to union in yielding to the majority desire of the states by voting a cession, on conditions which with one important exception were those ultimately agreed upon between her and Congress.⁵⁷ On the day set by Congress for the ceremony that would give legal existence to the Confederation by the signature of Maryland's delegates, and before they signed, New York's deed by which she actually ceded her western lands was presented to Congress.⁵⁸ This order of events suggested a happy recognition of Maryland's persistent position,⁵⁹ no matter whether it was or was not deliberately planned to be such. Although it was not until 1786 that the last cession was made of lands northwest of the Ohio,⁶⁰ the ultimate outcome could not have been in doubt after Congress proclaimed its policy in 1780—either as respected the northern cessions or those in the South later made by North Carolina and Georgia.

⁵⁴ On May 20, 1779 the Virginia delegates presented their instructions of Dec. 19, 1778, which ordered them to propose to Congress that it recommend to all states which had ratified the Articles that they ratify again with such others as should be willing to do so, the Articles to be then binding "notwithstanding that a part . . . shall decline"—*Jour. Cont. Cong.* 14: 617. As a matter of fact Connecticut had already, and before Virginia acted in Congress, instructed her delegates to like effect but with a clause that Maryland might at any time join if she desired—April 7, *ibid.* 617, 624.

⁵⁵ *Ibid.* 19: 214.

⁵⁶ *Ibid.* 19: 139.

⁵⁷ The Maryland instructions were of Feb. 2, 1781—*ibid.* 19: 140; Virginia's act authorizing cession was of Jan. 2, 1781—Hening, *Statutes*, 10: 564.

⁵⁸ *Jour. Cont. Cong.* 19: 211-14. Maryland's instructions had been presented to Congress on Feb. 12, 1781—*ibid.* 19: 138, 186. On other history of New York's deed see *ante* n. 50.

⁵⁹ Regardless of the question whether Maryland's position was motivated by concern for national interests or by a desire to protect her land speculators, the result must still evoke approbation. The former view of her policy has been taken by Mr. Jensen, *The Articles of Confederation*, 124, 197, 199; the particular evidence referred to at 237-38 seems to be unduly stressed.

⁶⁰ The last was by Connecticut, and excepted her "Western Reserve." Her statute was of May 1786; the deed to the Confederation—of Sept. 13, 1786—is printed in Carter, *Territorial Papers*, 2: 22-24 with notes; also in *Jour. Cont. Cong.* 31: 654-55. Massachusetts authorized cessions by acts of Nov. 13, 1784 and March 17, 1785; Congress declared on April 18, 1786 its

The principles then stated regarding the use and government of ceded territory satisfied the principal conditions—probably fairly well known through individuals⁶¹—which Virginia was likely to attach to a cession by her. It did not satisfy some to which she still clung, but when agreement had been reached between her and Congress on those acceptable to both,⁶² and she had ceded her lands, and Congress had accepted them subject to those conditions,⁶³ the Confederation became contractually bound to perform the undertakings to which, by the declaration of 1780, it had earlier been morally committed.

readiness to accept a deed, and it was executed the next day—*ibid.* 28: 271-74, 279-83. On New York's cession see *ante* n. 50. The final North Carolina act of cession, of Dec. 22, 1789, is printed in Carter, *Territorial Papers*, 4: 3-8, with important notes, including n. 2 on the cession act of April 1784, declared "repealed" in Oct. following; although legally, no doubt, irrevocable. Her deed of cession is in *ibid.* 9-13. The acts involved in Georgia's cession are found in *ibid.* 5: 18, 95, 142, with explanatory notes. On South Carolina's "shadowy claim," ceded to the Union on Aug. 8, 1787, see Carter, *Territorial Papers*, 5: 19 n. 32. Justice Curtis concluded that it had no merit—19 How. (60 U.S.) at 607n.

⁶¹ K. M. Rowland, *Life of George Mason* (1892), 359-67, cited by Mr. Jensen, *The Articles of Confederation*, 229.

⁶² In her resolution of Jan. 2, 1781 which conditionally authorized cession, Virginia included the stipulations: (1) "that all purchases and deeds . . . from . . . Indians . . . for any lands within . . . said territory . . . for the use or benefit of any private person . . . and royal grants within the ceded territory inconsistent with the chartered rights, laws and customs of Virginia, shall be . . . absolutely void"; and (2) that after any cession, "all the remaining territory of Virginia" should be "guaranteed to . . . Virginia by the said United States"—Hening, *Statutes*, 10: 566. The Congress—when considering Virginia's "remonstrance" of Dec. 1779, *ante* n. 49—had approved on Oct. 10, 1780 the first of these conditions to the extent of agreeing that no Indian purchases unratified "by lawful authority" should be "deemed valid or ratified by Congress"—*Jour. Cont. Cong.* 18: 916. In the final action of Sept. 1783 on Virginia's conditional cession offer of Jan. 2, 1781, it was judged sufficient by Congress to agree that all ceded lands should be held for the benefit of all the states, without specific reference to Indian titles—*ibid.* 25: 561, 562 (antecedents in *ibid.* 24: 271, 381, 384, 406-9, 444 n., and 25: 559-64). See also Hening, *Statutes*, 11: 566-70.

For the action taken in Sept. 1783 on the second condition stipulated in the cession offer of 1781, as above quoted, see *post* at notecall 73. In the Federal Convention Virginia renewed, unsuccessfully, her efforts to secure a guaranty by the Union of her remaining territory—M. Farrand, *The Records of the Federal Convention of 1787* (4 vol. 1937), 1: 11, 22, 202.

⁶³ See *ante* n. 53. Virginia's final cession act of Oct. 20, 1783 (an act of June 27, 1783 is referred to in *Jour. Cont. Cong.* 24: 444 n.) is in Hening, *Statutes*, 11: 326-28. The deed of cession of March 1, 1784, is in *ibid.* 567. It is printed from the original (incorporating the text of the cession act of Oct. 20, 1783) in Carter, *Territorial Papers*, 2: 6-9 with notes. The proceedings in Congress, ending in acceptance of the proffered cession and execution of the deed on March 1, 1784, are in *Jour. Cont. Cong.* 26: 89-90, 112-17. See, on causes of delay in this consummation, Jefferson's letter in *Writings* (Ford ed.), 3: 411-12.

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A contract to act, however, cannot create in the promisor a legal power to act. If the Confederation had any powers, whence were they derived? If any were expressly or by necessary implication conferred by the Articles of Confederation, it could only have been by that (Article 11) which provided that "Canada acceding to this confederation, . . . shall be admitted into . . . this union: but no other colony shall be admitted . . . unless such admission be agreed to by nine states."⁶⁴

Could the words "other colony" refer to anything else than dependencies of the British Empire other than those united by the Articles? Specifically, assuming that Maine had been given independence in 1786 by Massachusetts, certainly she could not then have qualified for admission as such "other colony." Could she have demanded admission, as of right, on the ground that she was "a former part of the confederation"?⁶⁵ Since she had been such "part" only in the sense that she had been included within the borders of Massachusetts, the question is doubtful. No doubt she would have been admitted, in fact, but hardly in logical consistency with the words of the Articles. The question was quite the same (except that there had been actual inhabitants of Maine long before the postulated separation from Massachusetts) as respects the applicability of the Articles to colonies formed in the Old Northwest which would have been already "in" the Union, geographically considered, because included within the limits of one or another of the former colonies, now independent states. If applicable, then no doubt such new colonies could, politically speaking, be "admitted" to the Confederation as new entities when severed from their parent states. But if so admissible, and so admitted, the number of members of the Union would clearly be considerably increased; and would it then be desirable to permit

⁶⁴ Art. 11.

⁶⁵ I am commenting upon a query made by Edward Stanwood in his article "The Separation of Maine from Massachusetts," *Massachusetts Historical Society Proceedings*, 1907-1908: 125, at 133. Note, however—in view of the history of Kentucky and Maine—the official punctuation in Art. IV, sec. 3 of the Constitution: "New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress."

continued admission by nine states as provided in Article 9?

When the committee of which Jefferson was chairman drafted in 1784 the first ordinance for government of the West (already largely acquired), and for admission of new states organized therein, they reported a plan in which it was assumed that Article 11 applied to the new western territory. All the above difficulties immediately appeared. Congress disposed of the last of these by providing that admission should be by "so many . . . as may, at the time, be competent."⁶⁶ It left open, of necessity, all the other questions. As a matter of fact it can scarcely be contended that Article 11 could apply; or, consequently, that any power to admit new states was to be found in the Articles—even one granted by reasonable implication from words granting other powers.

Moreover, that power was not the primary and most vital of the three powers in question. Primary was the power to *acquire* the western territories. If that existed, the authority to govern settlers, organize new states, and admit them, could possibly be implied. But there were no words whatever in the Articles that could be read as conferring the power to acquire. The situation was, simply, that Congress *had* acquired territories without express powers, and was resolved to acquire still more; and that its members were agreed on the policy of organizing governments and creating new states regardless of problems of legality.

The inevitable conclusion is that if any of these powers was ever held, legally, by the Confederation it was gained through amendment of the Articles. As to that, the Articles provided that there should not be "any alteration . . . made in any of them, unless such alteration be agreed to in a congress of the united states, and be afterwards confirmed by the legislature of every state."⁶⁷ This provision was for express amendments, and excluded any amendment other than express. And no express amendment was ever seriously considered. The parties to the compact were, however, sovereign states.⁶⁸ They certainly

⁶⁶ *Jour. Cont. Cong.* 26: 251-52 (April 20, 1784). See also Jefferson's account of this matter in his *Writings* (Ford ed.), 4: 156-57. George Ticknor Curtis commented upon these matters in his *History of the Origin, Formation and Adoption of the Constitution* (2 vol. 1854, 1858), 2: 76, 344-45. See drafts of the ordinance of 1784 in Jefferson's *Writings*.

⁶⁷ Art. 13—*Jour. Cont. Cong.* 19: 221.

⁶⁸ "If one adheres strictly to the conception of sovereignty as implying legal authority, then the only bodies whose doings must be held to be law,

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could not be bound by one compact if they agreed to another in derogation of the first; even private individuals can rescind their contracts by mutual agreement.

It is quite evident from the events recited in preceding pages that by a succession of acts of various states and of Congress—which, if considered chronologically, reveal *an orderly and integrated progression*—there had been created, as stated above, a general understanding and expectation with respect to the western lands by October 1779, and this was the solid basis of the letter from Congress to

because those bodies did them, were the states; they possessed the technical legal authority”—A. C. McLaughlin, *A Constitutional History of the United States* (1936), 135. Professor McLaughlin reached that conclusion with difficulty—*ibid.* 133-35; partly because of references to usage of the word “sovereignty” in *international* relations, where it is a complete misnomer. A very careful historian summarizes the organic counterargument thus: “The actual government of the United States from 1775 to 1781 was . . . in the Continental Congress, whose sole political authority consisted of the credentials given by each state to its delegates; these were not only indefinite, but could be changed or revoked at will. . . . So far, therefore, as legal theory is concerned, the case for state sovereignty seems to be complete. . . . It is equally clear, however, that no mere diplomatic body had ever exercised such a wide range of functions as were actually performed by the Continental Congress. It maintained a Continental army, . . . issued a Continental currency, incurred debts for the Union [confederated states] without consulting the states, and finally, in 1778, ratified a treaty with a foreign power. . . . Without a formal constitution, Congress managed to organize executive departments for war, foreign affairs, and finance, as well as a general postal service. It even organized a court for the trial of appeal in prize cases. From this practical point of view it can hardly be denied that the Continental Congress . . . was a *de facto* federal government, acting for a real political entity”—(he goes on to say, “known to the outside world as the United States of America,” but that is irrelevant). E. B. Greene, *Foundations of American Nationality* (1922), 558-59. Mr. Greene would, manifestly, have considered this argument much stronger after legal establishment of the Confederation on March 1, 1781 under the Articles of Confederation.

Professor Greene, however, was not talking about the same thing as Professor McLaughlin. The former is talking of government and arguing that there was an embryonic federal nationality. It is true that there was a distribution of powers between states and Confederation, a weak federal government of enumerated powers. But no sovereignty could be attributed to it; indeed, for lack of a people politically organized—as the people of all the united states became by popular adoption of the new Constitution in 1788—there was no federal state. The leading historical discussions of the question of sovereignty in the Confederation era are cited by Professor McLaughlin in his work above cited, at 134 n. 20; see particularly C. H. Van Tyne, “Sovereignty in the American Revolution” (1907), *American Historical Review*, 12: 529-45.

One cannot find in the terminology of any time the answers to questions of which that time was unconscious. It can, however, suggest latent differences of thought, the possible roots of later divergencies. The word “sovereignty” was used in the Declaration of Independence and Articles of

all the states in October 1780.⁶⁹ That letter made it clear that a decided majority of the states, though not all, were in substantial agreement that Congress would exercise *all* the powers in question if the states, by cession of their western lands, would make their exercise possible.

It had clearly been the strategy of Congress to produce that understanding. In 1781, long before the treaty of peace had given (some thought) additional basis for the claim that title was in the states collectively, New York had ceded to them her land (or relinquished to them her claims).⁷⁰ In 1783, the delegates of Maryland asserted that "[more than a majority] several of the states" had "acceded to the confederation under the idea" that the western territories "should be considered" as the common property of the Confederation;⁷¹ that is, *presently*, without cessions—in recognition of the collective achievement of independence. That this allegation was historically justified in its narrower form is indubitable. A strong argument could be made for it even in the broader form of the

Confederation, but in only two of the twenty-four state constitutions in force up to 1830—see Nathan Dane's *General Abridgment and Digest of American Law with Occasional Notes and Comments* (8 vol. 1823-1824; vol. 9, 1829, with app. 1830), 9 (app.): 24, 29-31, 44. Sovereignty was manifestly divided under the new federal Constitution, and presumably that is the reason why the word does not occur therein. Historians will find in Dane, *loc. cit.* secs. 13-18, an examination of state constitutions down to 1830 with reference to the concepts of sovereignty, compact, and independence.

On the nature of governments and location of sovereignty from 1776 onward compare J. Kent, *Commentaries on American Law* (6th ed. 1848), 1: 212 n.; J. Story, *Commentaries on the Constitution* (1833), secs. 198-217, especially 214; N. Dane, *Abridgment*, 9 (app.): 15-22; Benj. Rush, "Address to the People of the United States" (1787), in H. Niles, *Principles and Acts of the Revolution in America* (1822), 403.

Dane's artificiality was illustrated by the argument that the colonies were made "free and independent states" by the proclamation to that effect in the Declaration of Independence—*ibid.* 9 (app.): 14, 18; not by the Revolution, the treaty of peace, or history in general. However, Webster's type of argument against Hayne was no better with reference to the nationalism which, he contended, is embedded in the Constitution's preamble: "We the people of the United States." although its history proves that its meaning was, "We the people of . . . (naming the states uniting in ratifying the Constitution)."

⁶⁹ As Professor McLaughlin said of the Articles of Confederation: "it was understood before adoption that the tremendously important matter of the ownership of the back lands, and the administration of the back settlements—in other words the extension of the empire—was to be in the hands of Congress"—A. C. McLaughlin, "The Background of American Federalism" (1918), *American Political Science Review*, 12: 215, at 239.

⁷⁰ Carter, *Territorial Papers*, 2: 4.

⁷¹ *Jour. Cont. Cong.* 25: 557.

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bracketed words, which Maryland deleted as a matter of forensic tactics.

The issue was too momentous and too dangerous to admit of any direct settlement. In avoiding the dangers inherent in any attempt to settle it directly Congress evidenced extraordinary sagacity. In the proceedings just referred to above, the matter under consideration was Virginia's condition that, after cession of the Northwest, "all the remaining territory of Virginia . . . should be guaranteed to . . . [her] by the United States."⁷² Maryland's remarks were incidental to a motion challenging title in Virginia since legal establishment of the Confederation by Maryland's adherence to it in 1781. A committee of Congress advised rejection of both Virginia's condition and Maryland's motion, saying: "Congress cannot agree to guarantee . . . the lands described"—namely those south of the Ohio—" . . . without entering into a discussion of the right of the state of Virginia to the said land; that by the acts of Congress it appears to have been their intention . . . to avoid all discussion of the territorial rights of the different states, and only recommend and accept a cession of their claims, whatsoever they might be, to vacant territory."⁷³

⁷² See *ante* n. 62.

⁷³ See *ante* n. 62. The report is in *Jour. Cont. Cong.* 25: 559-63; quotation from 563. Reference has already been made to Edmund Randolph's compilation of "facts and observations" for the guidance of our peace commissioners, submitted to Congress Aug. 16, 1782—*ante* n. 12. In reading that report it is essential to remember, (1) that their duty was to submit what could be urged as a *legal* case upon the British Commissioners (who had nothing to do with the question of justice as between our states, considered individually and collectively), and (2) that they were bound to adhere, so far as possible, to the policy referred to in the quotation just given in the text. They laid down these principles as those which our commissioners must sustain: "1. That the territorial rights of the thirteen United States, while . . . colonies, were . . . defined in the instructions given to Mr. John Adams . . . August, 1779. 2. That the United States, considered as independent sovereignties have succeeded to those rights, or 3. That if the vacant lands cannot be demanded upon the preceding grounds, that is, upon the titles of the individual States, they can be deemed to have been the property of his Britannic Majesty immediately before the Revolution, and to be now devolved upon the United States collectively taken"—Aug. 20, 1782, *Jour. Cont. Cong.* 23: 497. In the instructions to Mr. Adams the title had been assumed to be in the individual colonies; he was to demand that all territory within the outer bounds of the colonies be "yielded to . . . the States to which they respectively belong"—*Jour. Cont. Cong.* 14: 959.

Unity of opinion was never reached before the cession, and no judicial decision on the merits of the question was ever or can ever be given; but the Supreme Court has in some cases *assumed* title to have been in the individual states. Chief Justice Taney, for example, so assumed—*post*

This distinction did not affect the phraseology of the deeds by which the rights of the individual states were actually passed to the states collectively.⁷⁴ In accord with the phraseology in which the differences between the states had so long been expressed, each state conveyed all claims alike as to the "soil" and the "jurisdiction." And this practice continues to the present time, though with altered and varying meanings of the latter word, in conveyances of or agreements respecting land owned by the United States within the boundaries of the several states.⁷⁵ Since this word "jurisdiction" is common in the state documents of the time, and an understanding of it is in some cases indispensable, a brief comment on it seems desirable.

preceding notecall 104; likewise Justice McKinley—*post* n. 89; compare remarks of Chief Justice Jay in *Chisholm's Est. v. Georgia* (1793), 2 Dall. 419, 470. A case before the General Court of Virginia in 1846 involved seizure of defendant prisoners at a point above low-water mark on the north side of the Ohio River, at a moment when aiding escaping Virginia slaves in unloading a boat and finding their way ashore; supposedly with knowledge of the fact that the Negroes were slaves and in conscious furtherance of their escape. The special verdict in the lower court did not include any finding on those points. Most of the judges disregarded that fact as a basis for judgment; several remarked that they were officially bound to assume Virginia's original ownership of the land beyond the Ohio and her actual cession of land and jurisdiction beyond the River to the Confederation (both points challenged by defendants' counsel); several, however, wrote lengthy discussions of those points, all favorable to Virginia. But the case was decided solely on the question whether defendants, standing *in* the water *above* low-water mark, were within Virginia and subject to her jurisdiction when engaged in the acts in question. It was held in the negative and the prisoners were discharged—*Commonwealth v. Garner* (1846), 44 Va. (3 Gratt.) 655-786. No appeal to a federal court was possible; and there was no decision by the state court of the historical questions, whatever was said on them being dictum. See *Handly's Lessee v. Anthony* (1820), 5 Wheat. (18 U. S.) 374.

⁷⁴ A non-lawyer who reads the deeds of cession (for example those of New York and Virginia—Carter, *Territorial Papers*, 2: 4, 6) will be puzzled to find in them no evidence of this distinction. They explicitly granted "soil" and "jurisdiction," and also all *rights* of the grantors in and respecting soil and jurisdiction. This is merely to grant the same thing twice in different words; one who owns land has *only* rights, or enforceable claims, in it. Either form of words is alone sufficient, although the vast majority of deeds are in the second form; and such tautology as in the deeds here in question has always been common.

⁷⁵ See New York—Carter, *Territorial Papers*, 2: 4; Virginia—*ibid.* 7, 9; Massachusetts—*ibid.* 11; Connecticut—*ibid.* 23. The North Carolina deed read "sovereignty and territory"—*ibid.* 4: 4. Georgia used "jurisdiction"—*ibid.* 5: 142, compare 19. "The landless States differed . . . in defining the terms on which the public lands should be held for the usufruct of the Confederation"—that is, held by the latter for the benefit of all the members—"all of them except Maryland holding that they should be used simply for the fiscal benefit of the Union, while the political jurisdiction should

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Various examples of its usage have already been quoted.⁷⁶ A case of particular interest and importance arose in the Western Reserve. In 1786 Connecticut ceded to the Confederation "all the right, title, Interest, Jurisdiction and claim" which she held in

continue to vest in the States. . . . At last the Maryland view prevailed." J. C. Welling, *Amer. Hist. Assoc. Papers*, 3: 413.

The old broad meaning of political dominion or power to govern which the word "jurisdiction" bore in the Virginia cession is also illustrated in Art. IV, sec. 3 of the Constitution, in passages in Kent's *Commentaries* (6th ed. 1848, 1: *257, 384), in the opinion given by the supreme judicial court of Massachusetts to her House of Representatives, March 10, 1841—42 Mass. 580; and in the mutual cessions between Georgia and the United States of April 24, 1802 (very similar to those between Connecticut and the United States of 1795)—Carter, *Territorial Papers*, 5: 142. In acquiring land from France, Spain, Mexico, Russia, and Denmark the word "jurisdiction"—being peculiar in the sense in question to English political literature—does not appear in the treaties, but of course the same political dominion was secured, and under our political system has been held, as Chief Justice Taney said, in trust for the new states created from the territory ceded, which, when created, were invested with it so far as required by a state's constitutional position in the federal Union.

The Union owns immense areas today within the states, and in the agreements between them respecting such areas the word "jurisdiction" may mean "judicial jurisdiction," the power of ordinary police regulation, or anything else up to so-called "exclusive" jurisdiction—which, literally, can never exist in either party, but only so far as their relations under the Constitution permit. Contemporary material can be located through P. S. Twitty, *The Respective Powers of the Federal and Local Governments within Lands Owned or Occupied by the United States* (Government Printing Office, 1944) but with no historical development.

⁷⁶ See the passages quoted *ante* nn. 12, 19, 21, 28, 29, and 74. To these examples three others may be added. By the proclamation of 1763 (Oct. 7) Great Britain placed under four distinct governments all territories in America just ceded to her by France except the Old Northwest. That was left with nothing but a few troops, military officers, and Indian agents until 1774. The Lords of Trade writing on Sept. 3, 1766 to George III referred to this region as "precluded from Civil Jurisdiction and Settlement"—C. W. Alvord and C. E. Carter, *The New Regime, 1765-1767* (*Illinois Historical Collections*, 11), 371. A committee headed by James Monroe reported to Congress on May 3, 1785 that "The State of Virginia"—when she relinquished to the Confederation claims to land in the Northwest—"having also relinquished her right of jurisdiction, and no government being as yet established over the said Inhabitants and settlers . . ." of the Illinois Country by Congress, "they are of course free from any . . . allegiance to the Union whatever"—*Jour. Cont. Cong.* 28: 331. Another committee, headed by James Duane, having recommended preparation of an ordinance regulating Indian trade, and particularly a prohibition against trade with them by civil or military officers, commissioners and agents for Indian affairs, a resolution was immediately passed that these measures were "not to be construed to affect the territorial claims of any of the states, or their legislative rights within their respective limits"—*ibid.* 25: 693.

The first great dispute litigated between the United States and a state after adoption of the Constitution was one of jurisdiction over the public lands—*Chisholm's Est. v. Georgia* (1793), 2 Dall. 419.

western lands⁷⁷ lying outside of her Western Reserve. She later (1795) sold to the Connecticut Land Company interests in the Reserve which were described in a statute empowering her agents to give to the individual stockholders of that Company deeds "quitting in behalf of this State all right, title, and interest juridical and territorial."⁷⁸ Connecticut's claims were disputed by New York and Virginia, and these deeds read as "quitclaim" deeds—that is, as though intended merely to convey such rights as later events might show the grantor to have held. This might explain the employment of the word "juridical" (or "judicial"), and the absence of any assertion that "jurisdiction" was either ceded or reserved. On the other hand the Company seemingly paid a price adequate for good title,⁷⁹ which of course tended to show that no quitclaim in the sense indicated was present. The nature of the conveyance was therefore doubtful from the beginning. At least some of the original grantees thought a grant of "interest juridical and territorial" was one of "jurisdiction," making them colonial proprietors empowered to set up and govern in the West a dependency of Connecticut.⁸⁰ But if that were not so, their sub-grantees, holding deeds under Connecticut, could not submit to the government that Governor St. Clair of the Northwest Territory sought to impose on them; yet both the Company and Connecticut refused to assert governmental power.⁸¹ It is quite clear that the United States would never have recognized a Connecticut colony in the midst of federal territory, nor have consented to recognize the validity of Connecticut's original western claims to the extent of accepting from her grantees the cession of their "juridical right" which they tendered in 1798.⁸² However, Connecticut offered at the end of 1798 to release her "jurisdiction,"⁸³—the Company presumably fol-

⁷⁷ Carter, *Territorial Papers*, 2: 23.

⁷⁸ See recital in original deed to stockholder in C. L. Shepard, "The Connecticut Land Company" (1916), *Western Reserve Historical Society Tract No. 96*, 170. The deed here reads "judicial," but the resolution of the General Assembly (May 1795)—quoted by John Marshall, *post* n. 84 at 97 and in the *Historical Collections of the Mahoning Valley*, 1 (1876): 151—required the conveyance to read as stated in the text, and Marshall states that the deeds so read, *ibid*.

⁷⁹ B. A. Hinsdale, *The Old Northwest* (1888), 380, to the contrary.

⁸⁰ Shepard, *op. cit.* 85; Hinsdale, *op. cit.* 375, quoting C. Whittlesey. Historians have made the same assumption—Mr. Shepard at 86, President Hinsdale on pp. 375, 378, of their books just cited.

⁸¹ Hinsdale, *op. cit.* 376, 377-78.

⁸² *Ibid.* 378.

⁸³ Carter, *Territorial Papers*, 2: 657.

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lowing with its offer because it assumed the two phrases to be synonymous—and after much delay committees of Congress (that of the House headed by John Marshall)⁸⁴ recommended in 1800 that the release by Connecticut be accepted; though even that was stoutly resisted as involving a guaranty of the validity of her original claims. Embarrassments were avoided by a grant to Connecticut from the United States of all title to the *soil* in the Reserve (which, were Connecticut's claim invalid, the United States would have gotten from other states, and which it was assumed⁸⁵ would pass through her to the purchasers from the Company), at the same time that a release of "jurisdiction" was accepted from Connecticut.⁸⁶ The Reserve was then made a county of the Northwest Territory.

It is clear from all this that "jurisdiction" as used in the Confederation era meant ultimate political jurisdiction, or lawful right to exercise governmental control. It was seemingly an echo of the political literature of medieval England.⁸⁷ In the Dred Scott case Chief Justice Taney and Justice Curtis agreed in giving the word the meaning stated, as regards the right passed to the Confederation by Virginia, the former manifestly understanding that at least full powers of government were transferred,⁸⁸ and the latter explicitly conceding that "sovereignty" was ceded.⁸⁹ North Carolina, indeed,

⁸⁴ *American State Papers, Public Lands*, 1: 94-98.

⁸⁵ Rashly, as of that date.

⁸⁶ Act of April 28, 1800—Carter, *Territorial Papers*, 3: 84. Hinsdale treated this whole subject very fully—*Old Northwest*, 370-88. See St. Clair to Secretary of State, Jan. 1796—Carter, *Territorial Papers*, 2: 549.

⁸⁷ As interpreted by Mr. McIlwain—C. H. McIlwain, *Constitutionalism: Ancient and Modern* (rev. ed. 1947), 77-78, 84-85, 139, 145. But the meaning of *gubernaculum* as interpreted by him (*ibid.*) had greatly changed; there no longer existed the sharply contrasted fields of government—one of absolute discretion, the other in which law was supreme. Only the latter remained; the control existing of "lawful right," and only that control, would have been evidenced by "government." So that Virginia, in ceding land and "jurisdiction," in effect ceded land and "rightful power of government."

⁸⁸ 19 How. (60 U. S.) at 605, when this statement is taken in conjunction with his general argument.

⁸⁹ *Ibid.* at 434. His words were that "the powers of Sovereignty and the eminent domain were ceded with the land." The eminent domain is, of course, included in sovereign power when the latter concededly exists. Assuming that the colonies became sovereign states when they attained independence—*ante* n.68—this would not determine the boundaries within which each held title to lands, sovereignty, and eminent domain. They were simply assumed by Chief Justice Taney to have had all these in the Northwest Territory—*post* preceding notecall 100. Likewise by Justice McKinley in *Pollard's Lessee v. Hagan* (1845), 44 U. S. 212, in saying (in a case involving the Southwest Territory): "When the United States accepted the cessions

employed in its conveyance the phrase "sovereignty and territory" to indicate the rights transferred.⁹⁰

Thus the states united in Congress exercised, as a matter of fact, two of the powers by accepting the cessions and passing ordinances for the sale of lands and for the government of settlers thereon; the existence of the third power, to admit new states, was assumed in the debates relating to Kentucky. By their votes in adopting some or all of these measures all of the states concurred in the general policy stated. There was no protest by any state, or by citizens of any state.

Now, Madison wrote in *The Federalist*: "*All this has been done; and done without the least color of constitutional authority.* Yet no blame has been whispered; no alarm has been sounded."⁹¹

But *was* it "done without the least color of constitutional authority"? It is essential to be clear on what Madison was discussing, and why. Certainly the actions of Congress up to October 1780, and until some indefinite date thereafter, could be properly characterized as usurpation. But he was not discussing the question whether the actions of the states and of Congress had ultimately cured the usurpation. To have expressed an opinion that they had would have *weakened* the point he was urging. He was referring solely to written, or express, "authority." He was defending certain specific grants of "effective powers" in the *new* Constitution; and, comparing it with the Articles of Confederation, emphasized "the dangers resulting from a government which does *not* possess *regular* powers commensurate with its object." His sole example of this "danger" was the "excrecent power" assumed by the old Congress over the Crown

of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new states" to be later created in the territory ceded, "and to invest them, with it, to the same extent, in all respects, that it was held by the states ceding the territories"—*ibid.* 222.

⁹⁰ Carter, *Territorial Papers*, 4: 13.

⁹¹ *The Federalist*, No. 38. He had himself voted for the supposed usurpations as conditions agreed upon between Congress and Virginia, Sept. 13, 1783—*Jour. Cont. Cong.* 25: 554-64. In *The Federalist* he defended them: "I mean not . . . to throw censure on the measures which have been pursued by Congress. I am sensible they could not have done otherwise. The public interest, the necessity of the case, imposed upon them the task of overleaping their constitutional limits"—No. 38. John Quincy Adams attempted to explain why the acts were legal: "The ordinance of 1787 had been passed by the old Congress of the Confederation without authority from the States, but had been tacitly confirmed by the adoption of the present Constitution, and the authority given to Congress to make rules-and-regulations for the Territory"—*Memoirs*, 5: 7. This suggested explanation is manifestly inadequate.

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lands. Congress, he said, had "assumed" the power, "overleaping their constitutional limits." He plainly implied that, on the contrary, the Constitution expressly provided for the power; and if one examines a later number of *The Federalist* in which he enumerated the powers expressly given to Congress one finds a plain implication that he found such provision in the power to "make all needful rules and regulations respecting the territory or other property belonging to the United States."⁹² His argument in Number 38 would obviously have been greatly weakened by any faintest suggestion that Congress, by securing an implied amendment of the Articles in plain violation of an express provision in *one* of them, might have given legality to its subsequent actions in the pact with Virginia.

Madison, then, should not be regarded as having intimated any opinion as to whether the initial usurpation by Congress was or was not cured by amendment of the Articles of Confederation. Whether a motion earlier made by him in the Federal Convention can be regarded as indicating his opinion on that question will be considered below.⁹³

George Ticknor Curtis, just after arguing before the Supreme Court the question of the constitutionality of the Missouri Compromise, suggested nearly a century ago in his *History of the Constitution*, after reviewing all historical precedents, that acquisition of the territory by the Confederation had been made a pre-condition (and he meant a legal pre-condition) to the Confederation's existence; and

⁹² Namely, No. 43, *post* cxi-xii. Taney, in *Dred Scott v. Sandford* (1857), 60 U. S. (19 How.) 393 at 447, referred to Madison's remarks in No. 38 and made no reference to No. 43. In the latter, Madison quotes the rules-and-regulations clause, and simply says: "This is a power of very great importance, and required by considerations similar to those which show the propriety" of the new-states clause. In discussing the latter he had just written as follows: "The eventual establishment of *new States* seems to have been overlooked by the compilers of that instrument"—the Articles of Confederation. "We have seen the inconvenience of this omission, and the assumption of power into which Congress have been led by it. With great propriety, therefore, has the new system supplied the defect." *Clearly, he here regards the two powers as quite distinct, equally needed, both provided for.*

There were very grave reasons of discretion for not going deeply in No. 38 into implied powers. It would not have been wise, especially, to evoke thought on the point that whereas the Articles expressly reserved all non-delegated powers to the states, the Constitution had no such provision. Nor to direct thought too strongly to the idea that the new government, which many thought (as the addition of ten amendments soon proved) was already too strong to satisfy public opinion, might be further strengthened by implication. Both the Articles and the new Constitution provided for express amendment only.

⁹³ *Post* at and following notecall 122.

that from *this* implied power the other power of erecting territorial governments ("forming new states") and admitting them into the Confederation could in turn be implied.

The acquisition of the territory itself rested upon acts, which were so directly and expressly connected with the establishment of the ... Confederation, as to make the acquisition itself part of the fundamental conditions of that Union, and the principal guaranty of its continuance. Among the declared purposes for which these acquisitions were made was that of forming new States, to be admitted into the Union; and as all the States acquiesced ... they may be said to have conferred upon Congress an implied power to ... carry it into effect.⁹⁴

A theory of primary and secondary implied powers is certainly undesirable. Besides, Mr. Curtis made his suggestion hesitatingly, and coupled it with an alternative suggestion that is manifestly unacceptable.⁹⁵ Perhaps for these reasons—perhaps also because his work was published at a time when even lawyers had barely emerged from the fog thrown over the Ordinance of 1787 by ideas of "social compact" and "natural law"⁹⁶—his suggestion has received little attention from students of the Confederation era.⁹⁷ On some theory Mr. Curtis decided that at least "it must be taken that the territory

⁹⁴ G. T. Curtis, *History of the Constitution*, 1: 294.

⁹⁵ These matters were fully discussed by the judges in the Dred Scott case, in which Mr. Curtis argued before them the issue of the constitutional powers of Congress in the territories. That case was argued twice in 1856, decided in March 1857. Curtis's first volume of the *History* was published in 1854; the second in 1858. The suggestions made in the first were not altered in the second. Just preceding the passage quoted in the text he admitted that the question whether the admission by Congress of new states, after adoption of the Articles, would have been "beyond the scope of its constitutional authority" was one of grave doubt; and immediately following the quoted passage he returned to the doubts raised by "the want of an express authority"—*ibid.* 293, 294, 295; see also 2: 347-48.

In addition to thus indicating a cautious distrust of his first suggestion he added the alternative thought that "perhaps this power existed, by implication, in the revolutionary government" as a "common attribute of sovereignty belonging to every government"—*ibid.* 1: 293-94. This was essentially two theories, each an impossible one. Sovereignty was uncontestedly in the states—*ante* n. 68; and on the idea of revolutionary action, compare Justice Chase's theory, *post* n. 107.

⁹⁶ *Post* cxcv.

⁹⁷ Of modern works on the Constitution, that dealing most fully with the subject of federal territories and the admission of new states is W. W. Willoughby's *The Constitutional Law of the United States* (2d ed. 3 vol. 1929). His opinion is quoted below. Nothing at all on the point under discussion has been found in such other works as it has occurred to the writer to consult.

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came rightfully into the possession"—meaning, of course, became the property—"of the United States."⁹⁸

However, the opinion "that the Congress of the Confederation had no constitutional power to accept these cessions of territory" has been stated to be "sufficiently plain" by Mr. Willoughby, who was certainly an authority on both our political institutions and our constitutional law.⁹⁹ He had, however, seemingly never given attention to more than the text of the Articles. His opinion seemingly rested solely on the dictum of Chief Justice Taney in the Dred Scott case, since that is the only authority he cited. "They"—the old Congress, which accepted the Virginia cession—"had no right to accept it," Taney declared; but he meant, as he explained, no right under the Articles of Confederation to accept it, citing no authority and giving no reasons. None were necessary if he had in mind merely express authority. It is clear that he could have had no other in mind.

It is also clear, in view of his statements, that he must have approved the above argument that the Articles were impliedly amended *if* that argument had been the only one available to sustain the *validity* of the acts of the old Congress. However, it was not. He advanced another reason for their validity. When Virginia, said he, ceded her lands,

Undoubtedly the powers of sovereignty and the eminent domain were ceded with the land. This was essential, in order to make it effectual, and to accomplish its objects. . . . But this Confederation had none of the attributes of sovereignty. . . . It was little more than a congress of ambassadors, authorized to represent separate nations, in matters in which they had a common concern.

It was this Congress that accepted the cession from Virginia. They had no power to accept it under the Articles of Confederation. But they had an undoubted right, as independent sovereignties, to accept any cession of territory for their common benefit, which all of them assented to; and it is equally clear, that as their common property, and having no superior to control them, *they* [but surely not Congress unless the delegates were acting under special instructions] had the right to exercise absolute dominion over it, subject only to the restrictions which Virginia had imposed in her act of cession. . . . The territory belonged to sovereignties, who, subject to the limitations above mentioned, had a right to establish *any form of government* they pleased, *by compact or treaty* among themselves, and to regulate

⁹⁸ G. T. Curtis, *History of the Constitution*, 1: 294.

⁹⁹ W. W. Willoughby, *Constitutional Law* (2d ed.), 1: 409.

rights of person and rights of property in the territory, as they might deem proper. It was by a Congress, representing the authority of these several and separate sovereignties, and acting under their authority and command, (but not from any authority derived from the Articles of Confederation,) that . . . the ordinance of 1787 was adopted. . . . We do not question the power of the states, by agreement among themselves, to pass *this ordinance*, nor its obligatory force in the territory, while the confederation or league of the states in their separate sovereign character continued to exist.¹⁰⁰

This suggestion of a compact made between the sovereign states, and performed by the Congress as the donee for that special purpose of Virginia's sovereign power to cede her territory, and of the other states' sovereign powers to consent to join her in common ownership and administration, rests on the same basis (the agreement of sovereign states) as that above offered by the writer¹⁰¹ in support of Mr.

¹⁰⁰ Dred Scott v. Sandford (1857), 19 How. (60 U. S.) 393, 434-35; italics added.

¹⁰¹ *Ante* at notecalls 63, 69 *seq.* Assuming that Virginia owned the Northwest, then the interstate compacts were entered into, and the Articles are to be regarded as amended, on March 1, 1784, the day on which Virginia ceded the land in accordance with and subject to the conditions antecedently agreed upon. There would be no fictitious taking effect by relation backward to validate antecedent acts—for there would be no such acts. Difficulties would occur, however, if one assumed the true owner to have been New York, whose deed had been earlier given, and unaccompanied by the counter formalities on the part of the Confederation which were present in the case of Virginia.

Either theory is supported by the opinion expressed in the same case by Justice Campbell: "there is only one rule of construction, in regard to the acts done, which will fully support them, viz: that the powers exercised were rightfully exercised, wherever they were supported by the implied sanction of the State Legislatures, and by the ratifications of the people"—19 How. (60 U. S.) at 504; compare 512. But all these views are to be distinguished from the essentially alegal view of Justice Chase (quoted by Campbell, *ibid.*) that "the powers of Congress originated from necessity, and arose out of and were only limited by events, or, in other words, they were revolutionary in their very nature."

Alexander Johnston thought that "The right to acquire property is as much the natural right of a government, however limited, as of an individual. . . . We are therefore to take the sovereign right to acquire territory as the justification of the ordinance of 1787"—"Ordinance of 1787," in J. J. Lalor, *Cyclopaedia of Political Science*, 3 (1884): 32 a; italics added. This is extraordinary law, political science, and history. Mr. Schouler's idea was different. To him the Ordinance of 1787 was above all need of justification, and being passed, rectified all past errors: "In Jefferson's plan"—1784, *post* Sec. IV—"one traces . . . the first lines of the method upon which the sublime experiment of State propagation has since proceeded,—at this early date almost a usurpation, but sanctioned and fully provided for in our ampler charter of 1787"—James Schouler, *Thomas Jefferson* (1919), 130. Subject to one change, Mr. Hockett is entirely correct in saying that

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Curtis' suggestion of an implied *amendment* of the Articles. In result they are only to a degree identical.¹⁰² The amendment view seems to be decidedly preferable.

In the first place, it is preferable in theory. It rests upon consideration of what the states and the Congress actually *did* over a term of years, and of such recorded *discussions* of these actions by the delegates of the states as now exist. Chief Justice Taney's solution of the problem is one of pure political theory, applied to one specific act—Virginia's cession. It ignores, otherwise, the historical background. It requires one to consider the "United States in Congress," although usually acting under the Articles, to be acting in these particular matters outside them, under a special agency of whose existence the proceedings of the Congress and letters of its delegate-members reveal no consciousness.

In the second place, the amendment theory is vastly preferable in substance. The theory of the Chief Justice obviously gave a compact character to *every provision in the Ordinance*, for the states acquiesced in all. It is plain from his language that he took every detail of the

"Congress had no better authority for what it did than the consent of the states implied in the acts of ceding their claims to the western lands,"—in reliance upon the promises made by the delegates of other states in Congress to do certain things if such cessions be made—"and their subsequent acquiescence in the ordinances"—H. C. Hockett, *Political and Social History of the United States, 1492-1828* (1931), 197. The acquiescence is, legally, of minor significance, the act in reliance upon a promise important. I disagree only with the added statement by Mr. Hockett that "To make them [the ordinances] strictly legal an amendment should have been added to the Articles."

¹⁰² The quotations are from Chief Justice Taney, 60 U. S. at 441, 435. Considering merely the validity of the Confederation's acts, their validity results equally from both of the two theories. But if one asks, how many of its acts were compacts?—the answer under the two theories varies immensely. If, under the view (universally accepted as sound) that the new Union "took nothing by succession from the Confederation," that the latter was dissolved and its ordinary enactments became mere "nullities," one asks which of its acts would survive as compact "engagements" confirmed by Art. VI, sec. 1 of the Constitution, the answers would similarly vary.

There is a passage in G. T. Curtis's *History of the Constitution*, 2: 348, which either carries an implication that the two Unions were one and that the Constitution was a revision of the Articles or shows how little Mr. Curtis had reflected upon the necessity of explicitly stating *all* powers when a new political entity was created. He remarks, namely, that since the power to admit new states could be found in *the Articles* only by implied amendment, and therefore might be doubted, and was of peculiar importance, it was "eminently necessary" that *it* be expressly granted in the Constitution; seemingly *not*, then, the powers to acquire territory and set up territorial governments.

instrument as the act of the sovereign states. This was vastly more than the Ordinance itself claimed. It went further than the most fervid eulogists of it—and Taney never was one—have ever asserted. Here and elsewhere the excesses in his argument are doubtless attributable to the intellectual enthusiasm of an advocate developing a case. His inconsistencies are explainable as due to a lack of time for revision of his opinion, on which he labored up to the last minute before it was filed. He was minimizing the powers of Congress in all other territories than the Old Northwest, and therefore instinctively made everything in the Ordinance for *that* territory the act, not of Congress, but of the sovereign confederated states.¹⁰³

¹⁰³ If Congress was *here* acting as an agent, was it ordinarily acting as a legislature? If so, there would necessarily have to be a government. In Chief Justice Taney's opinion one finds this striking statement: "It must be remembered that, *at that time*, there was no Government of the United States in existence with enumerated and limited powers; what was then called the United States, were thirteen separate, sovereign, independent States, . . . and the Congress of the United States was composed of the representatives of these separate sovereignties, meeting . . . to discuss and decide on certain measures which the States, by the Articles of Confederation, had agreed to submit to their decision. *But this Confederation had none of the attributes of sovereignty* in legislative, executive, or judicial power"—60 U. S. at 434; italics added. No distinction is here indicated between the period before the Confederation acquired technical legal character in 1781, and that after 1781 but before it acquired the specific powers to take territory and establish governments over people thereon. But in any event, Taney, in talking here of states and sovereignty, is just as blind to imperfect federal government as Professor Greene, *ante* n. 68, in talking of that government, was blind to state sovereignty. Of course the Confederation had a government of enumerated powers, by valid compact after 1781, though not sovereignty. Attributes of sovereignty are not essential to town, county, or higher government. Whether the enumerated powers and duties of the old Congress were powers of political "agency" or were "governmental" powers is a matter of words.

The language of the Confederation era implied its recognition as a government—*ante* at notecall 68 and that note. The Constitution plainly so refers to it in Art. VI, sec. 1. Although one finds in Dr. J. F. Jameson's *Essays in the Constitutional History of the United States . . . 1775-1789* (1889) an essay by him on "The Predecessor of the Supreme Court" and one by J. C. Guggenheimer on "The Development of the Executive Departments," there is none on the character of the old Congress. The transition in that respect from the old to the new system evidently seemed too plain to suggest comment. The greatest difference between the Articles on one hand and the Constitution (and the Dickinson draft of the Articles) on the other hand was that the Constitution created a national state adopted by the people, and not a confederation of independent states. But perhaps the next greatest difference between them is the attempt to make a clearer division and more extensive distribution of governmental powers. The powers conferred on the central government in each case were powers therefore exercised by the states through their executive, judicial, and legislative organs. The powers granted to the old Congress "for the more con-

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It must be emphasized against the theory of Chief Justice Taney that the agency of Congress (the Articles being silent, as on the points here in question) could be defined only by the terms of the compacts created by the actions of the states and Congress, and recorded in their respective state papers. Those compacts amounted to this: that the states should cede their land—that Congress should receive the same, establish governments, and nurture new republican states for admission to the Confederation. These compacts were created by the acceptance of Virginia's cession deed, on the conditions which had been agreed upon between the parties precedent to the conveyance. It is a simple *fact* that there were no compacts covering the *details* of the Ordinance of 1787; consequently, that was not in all respects the act of the states. And if one accepts the writer's theory that the Articles were amended, there were no amendments beyond the agreement just stated; but the agreement that Congress should create governments *left their details to legislation*. It will be later seen that for some of its provisions there *could not have been* any authority from the states—nor, after its re-enactment by the new Congress in 1789, authority under the Constitution.

As respects implied amendment of the Articles, it is obvious that no distinction is possible between powers to acquire, sell, establish governments within, and admit states created within, the ceded territory. All these powers were made constitutional if any amendment of the Articles was effected by the events above narrated, and it seems clear that there is ample legal basis for holding that an amendment of the Articles covering all the powers in question was effected.

In considering the reasonableness of this view, it should not be forgotten that the inadequacy of the Articles and the necessity for their amendment was never, from 1781 to 1787, absent from the minds

venient management of the general interests of the united states" (Art. 5) were a medley of executive powers—witness Mr. Guggenheimer's essay, *ante*; of judicial powers—see Dr. Jameson's essay, *ante*; and—must we not say of the residue?—*legislative* powers. A comparison of the lists of granted powers in the Articles (no. 9) and the Constitution (Art. I, sec. 8), and of both with the powers exercised by the legislative organs of the several states, requires that conclusion as a matter of traditional nomenclature. It is true that, for example, when the old Congress fixed quotas of soldiers, moneys, and military supplies which the states should respectively furnish they could perform or not perform their obligations so declared, because the central government could not coerce them. But this relates merely to the distribution of sovereignty between states and union. It affected the efficacy of the latter's powers but not at all their nature.

of members of Congress and other men in public life;¹⁰⁴ that for considerable periods of time, off and on, appeals by Congress for action to that end were before the assemblies of the states; and that the problem of the western lands would certainly have been ranked by members of Congress—with those of revenue and commerce, interstate and foreign—among the most important. Indeed, as respects relative importance, the fact that Congress exercised two of these powers on its own responsibility is good evidence that they were considered *most* important to the permanence of union. Nor is it to be forgotten that no generation of Americans ever proved themselves cannier or wiser in politics than those of the Revolutionary era. Once an end was actually attained—*authority* to attain which may for years have been desired—ratification of their acts was never sought in later proposals for amendment of the Articles; something new and further on was alone thereafter demanded. It was so with the actual acquisition of federal territory and setting up of territorial government; both of these were consummated facts in 1784, yet the only power thereafter asked for, and the only one so explicitly granted in the Constitution as to be beyond shadow of a doubt, was that of admitting new states.

Reference has been made above to Madison's statement in *The Federalist* that Congress overstepped its constitutional limits. If it did so, it was by a motion seconded by him on September 6, 1780,¹⁰⁵ from which resulted the revolutionary declaration by Congress on October 10 that any lands ceded by the states in accordance with its

¹⁰⁴ See for citations C. Warren, *The Making of the Constitution* (1929), index s. v. "Articles of Confederation"; E. C. Burnett, *The Continental Congress* (1941), index s. v. "Confederation—proposed additional powers." Note that in the report of Randolph-Ellsworth-Varnum—Aug. 22, 1781, *Jour. Cont. Cong.* 21: 894-96—it was recommended that the Confederation required "execution" in the following respects, among 21; namely, "12. By ascertaining the jurisdiction of Congress in territorial questions"—*ibid.* 895; note the word "jurisdiction" (*ante* at notecall 76 *seq.*). And the committee further reported that "without the extension of its power" in other cases the war might "receive a fatal inclination and peace be exposed to daily convulsion"; namely, a power "4. To recognize the Independence of and admit into the federal Union any part of one or more of the U. S. with the consent of the dismembered state"—*ibid.* On the other hand, in the seven additional articles, recommended for adoption by the states and addition to the Articles of Confederation, in the report of Aug. 7, 1786 (generally credited to Charles Pinckney), nothing on the federal territories appears—*ibid.* 31: 494-98. Nor will the subject be found mentioned in the other places to which the references of Mr. Warren and Mr. Burnett lead one. It does appear in the records of the Federal Convention, and in a way substantially to affirm the statement in the text.

¹⁰⁵ *Ante* n. 53.

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appeal of September 6 would be formed into republican states and admitted as equals into the Confederation.¹⁰⁶ And the appeal to the states, drafted by James Duane, which led to that result, after refusing to decide between the conflicting claims of the states, said this:

it appears more advisable to press upon those states which can remove the embarrassment respecting the western country, a liberal surrender of a portion of their territorial claims, since *they cannot be preserved entire without endangering the stability of the general confederacy*; to remind them how indispensibly necessary it is to establish the federal union on a fixed and permanent basis, and on principles acceptable to all its members; how essential to public credit and confidence, to the support of our army, to the vigour of our councils and success of our measures, to our tranquillity at home, and our reputation abroad, to *our present safety and our future prosperity, to our very existence as a free, sovereign and independent people*. . . .¹⁰⁷

The powers were exercised out of a supreme necessity. More than any other causes of the time these supposed acts of usurpation created nationalism. No ratification of them was ever sought or needed. They were the concerted acts of the sovereign states, either outside the Articles as Chief Justice Taney suggested, or in amendment of them.

As regards the legal validity of the Ordinance, the choice must be between the two theories above suggested. There is no other by which one can avoid the conclusion that all the acts of the Confederation in acquiring territory and organizing governments therein were totally illegal.¹⁰⁸

¹⁰⁶ *Jour. Cont. Cong.* 18: 915.

¹⁰⁷ *Ibid.* 17: 806; italics added.

¹⁰⁸ Mr. Curtis' suggestion of sovereignty in the Confederation, *ante* n. 95, is of course disregarded. The "engagements" of the Confederation assumed by the new Union under Art. VI, sec. 1 of the Constitution were valid compacts.

Professor Channing wrote in his *History*: "As to the constitutional or legal status of the Ordinance of 1787 or of Jefferson's earlier ordinance, or, indeed of the contract made by Congress with the Ohio Company, nothing can be said. It is clear that the Congress of the Confederation had no power to make any of them. . . . There is even more doubt as to the standing of the compact clause[s] of the Ordinance than as to the other parts of it. Granting that Congress had power to establish governments in the western country, it surely had no authority to prohibit the dwellers in the States to be formed therein from doing this, that, or the other"—E. Channing, *A History of the United States*, 3 (1912): 547. He here cleared his pages of belief in compacts that bound Congress, the original states, the people of the Territory, and future states formed therefrom; but in ridding himself of that error he fell into the more egregious error of failing to see that (under his admission of a power to govern) *all* the Ordinance was good as legislation for the territory.

All of the powers in question were actually exercised by the old Congress save that of admitting new states. The admission of Kentucky was discussed, as already remarked, but the Confederation was displaced by the new Union without action being taken. The non-exercise of the admissions power could not affect its legal existence while the Confederation endured. The exercise or nonexercise of any power by, or the legal existence or nonexistence of any power in, the Congress of the Confederation could not affect the question of its existence in the new government under the Constitution. Extraordinary ideas have been entertained, and some puzzling statements made even in the Supreme Court, respecting the relation between the Ordinance of the old Congress and the Constitution which was in process of being framed when that enactment was passed. Their relation must later be considered. But first, with the propositions just stated in mind, it is desirable to review what was actually done in the Federal Convention.

The actual compacts entered into between Virginia and her sister states have just been stated. Those were engagements, entered into by the united states before the adoption of the Constitution, which by it were made "as valid against the United States under this Constitution as under the Confederation." The new government was therefore *obligated* to perform them. The question is now to be considered whether it was *empowered by express provision of the Constitution* to perform each of the obligations thus assumed.

IV

The power to admit new states was provided for from the outset in at least all the leading plans submitted for consideration.¹⁰⁹ The problems presented by Maine, Kentucky, and Vermont, even aside from that of disposing of the ceded territory northwest of the Ohio, made such a provision indispensable. It was approved¹¹⁰ at an early date. Moreover, because it necessarily became entangled with the dis-

¹⁰⁹ Farrand, *Federal Convention*, 1: 22, 231 (Virginia plan), 136 (Pinckney plan), 245 (New Jersey plan). Hamilton's brief plan, actually presented to the Convention did not mention it—291; his "unpresented plan" did, *ibid.* 3: 630.

¹¹⁰ June 5, *ibid.* 1: 117 (committee of the whole) and July 18, 2: 39 (in Convention); ref. to Com. of Detail, *ibid.* 2: 133, rep. by same, 188; ref. to Com. of Style, 578; rep. by same, 602.

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cussion of other difficult problems—respecting congressional representation, respecting the creation of new states by division of old states with or without their consent, and respecting the guaranty to such states of republican government and equality with the original states—it retained prominence throughout the Convention's deliberations.

That the other powers must have been constantly in the minds of the members seems certain. They must have realized that after the union of the states in the Confederation had been achieved through the cession of western lands, "the motives by which it was formed, and concessions by which it was accompanied and followed, created a vast obstacle to any future dissolution."¹¹¹ The *fact of union* was inherited from the Confederation; the purpose of the Constitution was only "to form a more perfect Union." Moreover, Georgia and North Carolina still held great claims in the Southwest. They, with all other states, had been urged in 1780 to cede their lands; and their cession was unquestionably of no lessened import to the new Union. Finally, unless Kentucky were to be admitted as a new state with its then existing boundaries and organization, the territory therein included would have presented the same problems as to both acquisition and government.

Acquisition of Territory.

Despite these indubitable facts it is equally a fact that our present Constitution contains no general reference whatever to the acquisition of territory, either domestic or foreign. That this was a discreet omission as regards foreign territory has been pointed out above.¹¹² The power to acquire such territory has repeatedly been declared by the courts to be implied in the powers to wage war and to make treaties.¹¹³ The power to acquire territory by discovery or occupation has also been recognized; either as established simply by precedent, or as inhering of right in the Union because the states have concededly renounced such powers and it is assumed to reside somewhere of necessity.

There are statements in opinions of the Supreme Court and in commentaries on the Constitution that a power to acquire territory

¹¹¹ G. T. Curtis, *History of the Constitution*, 1: 140.

¹¹² *Ante* lviii.

¹¹³ W. W. Willoughby, *Constitutional Law* (2d ed.), sec 231, gives citations; and see *post* n. 117.

is implicit in the power to admit new states.¹¹⁴ This is not satisfactory logic even as respects domestic territory. As respects foreign territory, it is far more difficult to attribute any such view to the framers of the Constitution. The Federal Convention voted to strike from the provision for admission of new states, in its early form, the phrase "within the limits of the United States,"¹¹⁵ leaving the provision as it now stands: "new States may be admitted by the Congress into this Union." But doubtless some members who, like Gouverneur Morris, foresaw annexation of foreign territory shared his opinion¹¹⁶ that states should never be formed therefrom; and it cannot be known how many were either of that or of the contrary opinion among those who voted to omit the phrase above quoted. Consequently, one cannot assume an understanding in the Convention that a power to annex foreign territory is impliedly conferred by the power to admit new states. A view that the power was nevertheless so conferred would be strained and illogical,¹¹⁷ in addition to being unnecessary.

Why no provision was made, either expressly or by reasonable implication, for the acquisition of the still unceded lands claimed by individual states within the treaty limits of the Union, is only inferentially explainable. It can hardly be assumed that the members of the Convention remained to the end in doubt as to whether they were creating a totally new political entity, all of whose powers must be granted *de novo*. It is also difficult, today, to see anything in the powers of acquiring domestic territory and organizing governments

¹¹⁴ W. W. Willoughby, *op. cit.*, sec. 236, gives citations. When ratification of the treaty ceding Louisiana was pending Jefferson found no constitutional difficulty in the way of *acquiring* foreign territory: but he also found no power "for holding foreign territory, still less for incorporating foreign nations into our Union"—see his letters in *Writings* (Ford ed.), 8: 241, 244. If he found acquisition permissible, no logical denial of a power to hold would seem possible—except by one who construed that to mean "hold for statehood" and denied that new states could ever be formed from foreign territory. See *post* cxxvi-viii.

¹¹⁵ On Aug. 29-30—Farrand, *Federal Convention*. 2: 188, 446, 454-58.

¹¹⁶ *Post* cxxvi-viii.

¹¹⁷ Chief Justice Taney endorsed it in *Dred Scott v. Sanford* (1857), 19 How. (60 U. S.) 393, 446-47. W. W. Willoughby, *Constitutional Law* (2d ed.), deals with this theory in secs. 231-35, but what is there said relates almost wholly to another question stated in two ways: (1) can foreign territory be annexed and not be formed (ultimately) into states? or (2) is the power to annex such territory limited to that which is taken for the purpose of forming new states? The latter was the view not only of Chief Justice Taney, but also of Chief Justice Marshall implied in *Loughborough v. Blake* (1820), 5 Wh. (18 U. S.) 317, 324.

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therein which could have impeded provision for them in the Constitution. The violence of past opinions on these matters explains why the old Congress had sought and secured these powers by indirection, rather than through express amendment of the Articles of Confederation. But by 1787 events had proved that they were powers which sentiment throughout the country had either long demanded or had finally recognized as desirable. Looking backward, and applying to the Union as of 1789 our present-day conceptions of it as a sovereign state, it might be argued that the Union would necessarily have had power, from the beginning, to accept any territory owned by member states; and that therefore no provision granting such a power was needed. And it could be assumed that the members of the Convention would have acted on this reasoning—notwithstanding that they elsewhere *explicitly* provided for purchase from the states for the Union of sites for public buildings and military establishments. But, aside from the great objections to which these suggestions are obviously open, it is to be remembered that the anticipated acquisition of lands from North Carolina and Georgia—the only domestic territory for acquisition of which (if of any) provision could then have been thought necessary—was a very special case. Territory had been claimed by Virginia, and other territory by these states, which in each case was also claimed by the Confederation as former Crown land. The compromises which had composed the differences with Virginia had involved compacts with the Confederation, and the Constitution provided for assumption by the new Union of such obligations of the old. But there had been no mutuality of actions which could create compacts with Georgia and North Carolina. It seems clear, therefore, that this was a case in which there should have been a specific provision for power to acquire, to govern, and to form new states. We have seen¹¹⁸ that Madison so regarded the situation as respects the last two powers. Logically, the need would seem equally clear as respects the power to acquire.

Its omission remains surprising. An examination of the records of the Convention suggests that a continuing violence of opinion probably explains the absence from the Constitution of any reference to the subject. And this violence of opinion probably also explains why debate of the problem was postponed to a late date in the Convention's ses-

¹¹⁸ *Ante* lxxxiv-v.

sions. Discussion of the power to admit new states "within the limits of any of the present States" was immediately embroiled by the questions whether the erection of new states within the limits of the "large" states, if desired by a majority derived from the "limited" states, should be subject to the consent of the former; whether, as sovereign, these might withhold consent; whether there was any likelihood that Virginia or North Carolina would make trouble as respected their transmontane settlements, or Massachusetts respecting Maine, or New York respecting Vermont; whether as regarded New York's sovereignty in relation to Vermont, it was not already denied by the "assurances" which the old Congress had given to Vermont. On one side the rights of the "large" states were deemed dominant. On the other, it was contended that the Constitution should at least provide that nothing in it should be construed to prejudice "the right" of the United States to the lands (or at least the "vacant" lands) ceded by Great Britain in the treaty of peace. Other members were for ignoring all these problems, and their view prevailed. The provision was adopted that nothing in the Constitution should be construed "to prejudice any claims of the United States, or of any particular State."¹¹⁹

Thus, the compromise reached under the old Congress was left to operate under the new Union and its results proved to be equally happy. North Carolina and Georgia ceded their lands; Kentucky and Vermont were soon, and ultimately Maine, admitted as states; and the problem of domestic territory disappeared.

Establishment of Territorial Governments.

Before considering theories usually considered in seeking a constitutional basis for the power to govern territorial inhabitants, we may glance at the unique theory of Thomas Hart Benton. Conceding that the great powers presupposed by the action of the Congress were lawfully exercised, he found that authority to enact the Ordinance of

¹¹⁹ Art. IV, sec. 3, sub-sec. 2. The Convention sat from May 25 to Sept. 17; the debate was on Aug. 29-30; see Farrand, *Federal Convention*, 2: 455-65. A motion that all such claims be left to the Supreme Court for decision was rejected—458, 459, 466. References to the irreconcilable differences between the "large" and the "limited" states are numerous.

See n. 102 *ante* for comment on a curious passage in G. T. Curtis' *History*.

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1787 was implicit in the grant of title and "jurisdiction" in the deeds ceding the territory to the Confederation. The compacts between Virginia and the Confederation were most explicitly and emphatically recited in accepting the conditions of her grant; *they* created, and by delimitation defined, the powers of the Confederation. Benton referred to them as "limiting" the Confederation's right, which would otherwise have been an "absolute authority" over the ceded territory; and he found the source of that absolute authority in the deed. No question of the right of a government of limited powers, specified in the Articles, to *take* the territory in 1784 was raised. No inquiry into the constitutional source of the power of the new Union to take the territory or govern the territory's inhabitants seemed necessary. The deeds which ceded "jurisdiction" in 1784 supplemented the Articles and supplemented the Constitution!

The character of the ordinance . . . the new Congress having adopted it . . . became the measure of the authority which the [new] Congress exercised. And these will be found to be of the highest sovereign order—ruling people without their consent . . . ; granting what it pleased as favor, nothing as right; and even abolishing the rights of private property without compensation: for many were the slaves set free in the old French settlements of Indiana and Illinois without compensation—set free for a public political object, without reference to the rights, or regard to the will of the owners.¹²⁰ That act of Congress, of August 7th, 1789, did all this, and with universal approbation; and. . . Certainly not under any written authority anywhere; for none such can be shown. How then did it get these powers? Simply as proprietor, and as sovereign! The Federal Congress of '89 got it as the Continental Congress of '87 got it—as a right incident to ownership and jurisdiction, and as a duty under the cession acts; and the only limitation upon its power was in the cession acts—in the obligation to dispose of the soil, to populate it, and to build up future Republican States upon it. . . . On no other ground than that of absolute authority (limited only by the cession acts) over these Territories can . . . this act of Congress be accounted for; and upon that ground I place it, disclaiming any help from any quarter—from Federal or State authority, single or combined.¹²¹

¹²⁰ There is no authority for this—*post* n. 158 of Sec. III.

¹²¹ *Historical and Legal Examination of . . . the Dred Scott Case* (1857), 36-37. This theory was consistent with the recognition of jurisdiction as a political power distinct from ownership of the soil—*ante* lxxxiii; and for that reason it was closely associated with the befuddled argument that the rules-and-regulations clause of the Constitution related to territory only as property because the Ordinance of 1787 had already dealt with the Con-

Such statements explain how the Confederation acquired ownership, if it had power to acquire it, but not how it received power. They do not explain how the new Union either acquired the territory or assumed obligations relating thereto, or how the new Congress acquired governing power. Moreover, if mere proprietorship gave power to govern, why not more clearly power to sell and dispose of the soil? If no provision in the Constitution was necessary as to the first, why was it not even less necessary as to the second?

The action of the Federal Convention as respects the power to govern settlers within acquired territory is even more extraordinary than its silence respecting the power to acquire territory. It was only after the report of the Committee of Detail, and when four-fifths of the time during which the Convention sat had already elapsed, that the first reference was made to any power (of those in which we are interested) other than that to admit new states. A motion being then made to refer to a committee "additional powers" for consideration, we find among them the provisions that Congress should be empowered "to dispose of the unappropriated lands of the United States" and "to institute temporary governments for new States arising thereon." Madison then moved specially the commitment of these provisions.¹²²

Is this motion to be taken (the question has been raised above)¹²³ as indicating that in Madison's opinion those powers had not been granted to the Confederation by implied amendment of the Articles? Not at all—rather the contrary, and for a most obvious reason. It will be noticed, namely, that one of his motions assumed that the ceded territories *were* "the property of the United States"; hence, that their

federation's only Territory as respected jurisdiction—see *ibid.* 91 and *post* at notecall 184. In another place in his book Benton expressed the idea embodied in the passage quoted in the text, deriving the power to pass the Ordinance from "the right of the owner to use what he owned"—which, alone, would be inconsistent with the theory in the text—"and of the sovereign to rule within his sovereignty"—*ibid.* 35, italics added; see *post* n. 205.

But in another passage he expressed the *inconsistent* view that by the prior-engagements clause (Art. VI, sec. 1) the Constitution confirmed the compacts between the Confederation and the land-ceding states, and says: "The Constitution provided for the fulfillment of both branches of the engagement, and the adoption of the ordinance fulfilled the political part of the engagement,—building up political communities on the Territory; and . . . the acts of Congress to sell the public land, fulfilled the other"—*ibid.* 50. (This was not a correct statement of the compacts—*ante* xci.)

¹²² Aug. 18—Farrand, *Federal Convention*, 2: 321; Madison's motion, 324.

¹²³ *Ante* at notecall 93.

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acquisition had been legally effected. If so, all the other powers—including, by equal intendment of the member states, the power to admit new states—had likewise been legally conferred. It would seem then that the true import of Madison's motion is merely an implied recognition that all the powers of the *new* Union must be created *de novo*.¹²⁴ We have just seen that it proved impossible to do this as regarded the acquisition of domestic territory; and that the omission did not indicate a decision that the power was unnecessary. Its need was conceded, but its omission was forced by the impossibility of disentangling it from the power to admit new states.

Much the same was true of the power to organize governments within ceded territories, howsoever acquired. Madison's motion, above stated, was referred to the Committee of Detail.¹²⁵ Nothing more is to be found respecting it until, in the midst of the long and tense debate on admission of new states, Gouverneur Morris suggested and the Convention adopted¹²⁶ the provision which in its final form in the Constitution reads:

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.¹²⁷

The background of the last clause has been made clear above. On the first clause the Convention records throw no light whatever.

It is, of course, quite clear throughout the controversy of the Confederation era respecting western lands that the intent was to set up general governments—states, in the sense of political science. The instructions given by the original states to their delegates in Congress

¹²⁴ Were the members of the Convention fully conscious that they were creating a totally new state? If not so at the beginning, when did they become so? There is considerable in the records bearing on these questions. Compare Hamilton's early remarks (June 19)—Farrand, *Federal Convention*, 1: 294-95. Indeed, pertinent materials go further back; see E. P. Smith, "The Movement toward a Second Constitutional Convention in 1788," in J. F. Jameson, *Essays*, 46-115; and R. L. Schuyler's remarks on the Annapolis Convention, *Constitution of the United States . . . Its Formation* (1923), 26-27.

¹²⁵ Aug. 18—Farrand, *Federal Convention*, 2: 324, 325.

¹²⁶ Aug. 30—*ibid.* 459, 466. According to Madison's *Notes* Morris was the mover and the vote was 10 to 1, Maryland being the dissenter, but this last was questioned by Dr. Farrand, *ibid.* 459 n. 4.

¹²⁷ Art. IV, sec. 3, sub-sec. 2.

so indicate. The titles of their enactments so indicate.¹²⁸ Various illustrations of the language that would naturally be used to express such intent have appeared in earlier pages;¹²⁹ and references to this usage as respects the word "states" will be made more than once hereafter.¹³⁰ In all these cases the language used includes references to the "organization" or "establishment" of "states" or "governments." The old Congress had in fact created for the Northwest Territory a government not only general in nature but intended to be peculiarly permanent. However, the confederated states being unqualifiedly sovereign before adoption of the Constitution, their power to do all this—in one way or another—could not be doubted. The compacts between Virginia and the other states authorized the establishment of a territorial government; and those compacts neither prescribed nor limited the nature of such government.¹³¹

The First Congress of the new Union, whose members included twenty-two who had assisted in framing (and eighteen who had signed) the Constitution, re-enacted the Ordinance by which territorial government had been organized in the Northwest in order that it might "continue to have full effect."¹³² Nor is there any evidence that there was any disposition to question, save in the detail of slavery when that had become an issue in national politics, the desirability or constitutionality of such a general government as had in fact been established.

Everybody admitted that the acquisition of the land itself had been essential to the creation, and that its sale was essential to the maintenance, of the Union. Justice McLean pointed out in opinions on the circuit, and repeated in his opinion in the Dred Scott case, that the sale of the land made necessary such government as was required for the protection of the land and its purchasers.¹³³ Chief Justice

¹²⁸ Jefferson's ordinance of 1784 bore no formal title, as printed in the *Jour. Cont. Cong.*, but was described as "a plan for the temporary government of the Western territory"—26: 118, 248, 255, 274. For the Ordinance of 1787 see *post* n. 292.

¹²⁹ *Ante* preceding notecall 19 and at notecalls 22, 53.

¹³⁰ *Post* clxxii-vi, ccliv-vi, n. 225 of Sec. IV, ccclxxix.

¹³¹ *Ante* xcl.

¹³² Aug. 7, 1789—Carter, *Territorial Papers*. 2: 203. Charles A. Beard, *Economic Origins of Jeffersonian Democracy* (1915), ch. 2, gives the data relative to men who were members of both the Convention and the First Congress.

¹³³ In 1854 he had remarked in a circuit opinion that, since Congress indubitably had power to sell the public lands, that "renders necessary the

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Taney went much further, having in mind the duty to nurture new republican states. "Some form of civil authority," he said, "would be absolutely necessary to organize and preserve civilized society, and prepare it to become a State." "Until that time arrives, it is undoubtedly necessary that some Government should be established, in order to organize society, and to protect the inhabitants in their persons and property." "What is the best form of government," he said, "must always depend on the condition of the Territory at the time, and the choice of the mode must depend on the exercise of a discretionary power by Congress, acting within the scope of its constitutional authority."¹³⁴ Taney did not, indeed, recognize a discretion extending so far as the prohibition of slavery. But Calhoun and William Wirt and William H. Crawford did, in 1820, when as members of Monroe's cabinet they endorsed the constitutionality of the Missouri Compromise—though Calhoun, at least, later repudiated that opinion.¹³⁵ Madison, too, during the Missouri debate, though he chose to deny to Congress the right to take such action as a matter of discretion, had no historical evidence and no logical reasoning on which to base the denial.¹³⁶ That authority had in some manner been conferred upon Congress by the Constitution to establish territorial governments of very broad powers was necessarily assumed by all these men.

But all this is quite apart from the question of the source of the power so to act. At this point one may well note the interpretations

organization of a government for the protection of the persons and property of the purchasers"—*United States v. Guthrie* (1854), 58 U.S. (17 How.) 284. He reiterated this in 60 U.S. at 540, 542.

¹³⁴ 60 U.S. at 449, 448.

¹³⁵ J. Q. Adams, *Memoirs*, 5: 5. Their hearts here prevailed, as Adams said, over their reason, since they could point to no grant of power to Congress authorizing such action. But the same was true of Adams himself as respected the view that a prohibition of slavery in a territory "forever" would bind a state later created therefrom, after its admission into a Union of "equals." See his remarks—*ibid.* 5, 9; also his *Writings* (Ford ed.), 7: 1.

Missouri was admitted free of any provision relating to slavery therein, but slavery was barred from other territory north of 36°30'. Of several matters contested in the Missouri debate, this was only one, and Professor Woodburn came to the conclusion that it "was probably not debated more than three hours. . . . Very few slavery extensionists questioned the right and power of Congress to prevent the spread of slavery to the Territories. That question, in the minds of those who opposed restriction in Missouri, was incidental to the question of the right of Congress to impose conditions upon a State"—J. A. Woodburn, "The Historical Significance of the Missouri Compromise," *Amer. Hist. Assoc. Report*, 1893: 249, at 290. See *post* n. 277.

¹³⁶ *Post* at notecall 152.

given to the Convention's work by Chief Justices Marshall and Taney.

The former expressed various views, all of them quoted in every discussion of the Constitution's meaning.¹³⁷ He suggested that the power to govern "may be the inevitable consequence of the right to acquire property."¹³⁸ He also once stated that "perhaps" the power to govern "necessarily" resulted "from the facts that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States."¹³⁹ If the word "jurisdiction" be here given its usual meaning in the state papers of Marshall's time (and when in the House of Representatives he had written a report on a famous case that arose out of that very usage) the above statement is a *petitio principii*. But no matter what may have been intended, the Chief Justice added: "The right to govern, may be the inevitable consequence of the right to acquire"—which would be merely a repetition of the preceding quotation if, in that, "jurisdiction" be read as synonymous with physical control. And, finally, Marshall also recognized the rules-and-regulations clause as one source of the governmental power of Congress over the territories,¹⁴⁰ and we

¹³⁷ In House Doc. 509, 56 Cong. 2 Sess., *The Insular Cases* (1901), 1075 pages, will be found a great collection of quotations from source materials and discussions thereof taken from the records, briefs, and arguments of counsel in those cases.

H. C. Black, in his *Handbook of American Constitutional Law* (3d ed. 1910), summarized the authorities thus: "In fact, the power cannot be derived from any narrow or technical interpretation of the Constitution. But it is necessary to recognize the fact that there is in this country a national sovereignty. That being conceded, it easily follows that the right to acquire territory is incidental to this sovereignty. It is, in effect, a resulting power, growing out of the aggregate of powers delegated to the national government by the constitution. And if a more positive justification is needed" it can be found, he thought, in the war and treaty powers—on which are always cited *Amer. Insur. Co. v. Canter* (1826), 1 Pet. (26 U.S.) 511; *DeLima v. Bidwell* (1900), 182 U.S. 1; *Jones v. U.S.* (1890), 137 U.S. 202; *Shively v. Bowling* (1893), 152 U.S. 1.

Of course there is "a national sovereignty"; but Jefferson found it, under the Ninth and the Tenth Amendments, in the people of the United States so far as regarded holding foreign territory or forming states therefrom. Mr. Black's assumption that the federal state *must* hold sovereignty is not sustainable by logic, but only by our history since 1803.

¹³⁸ *Amer. Insur. Co. v. Canter* (1826), 1 Pet. (26 U.S.) 511, 542-43. The same suggestion had been earlier made in *Sere v. Pitot* (1810), 6 Cranch (10 U.S.) 332, 336. See *Latter Day Saints* (1889), 136 U.S. 1, 42.

¹³⁹ *Canter case*, preceding note, at 542. See *ante* at notecall 75 seq.

¹⁴⁰ *Ibid.* Compare discussion of this case by Chief Justice Taney and Justice Curtis in 60 U.S. at 442-43 and 540-41 respectively.

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have seen that Madison mentioned no other.¹⁴¹ As already stated, it has become increasingly common to interpret that clause as conferring broad governmental power. On the other hand Chief Justice Taney contended (1857) that it was not intended to confer any governmental power whatsoever. Said he:

The words "needful rules and regulations" . . . are not words usually employed . . . to give the powers of sovereignty or to establish a Government, or to authorize its establishment. . . . The words "rules and regulations" are usually employed in the Constitution in speaking of some particular power . . . and not . . . when granting general powers of legislation. . . . And to construe the words . . . as a general and unlimited grant of sovereignty over territories which the Government might *afterwards acquire*, is to use them in a sense and for a purpose for which they were not used in any other part of the instrument.¹⁴²

Whether this contention rested on any convincing grounds of either logic or history will now be considered.

Before doing so it may be remarked that as a matter of fact Congress had long before he spoke—indeed, before Marshall uttered any of the above suggestions—done things in control of persons within acquired territory which, seemingly, could be sustained as legal only by a power outside that to make rules and regulations respecting organized territories.¹⁴³

V

The rules-and-regulations clause, literally read, seems to refer to "territory" only as property, as Taney contended it did. In that case one could scarcely find in it a power to govern the inhabitants of

¹⁴¹ *Ante* at notecall 92.

¹⁴² 60 U.S. at 440; italics added.

¹⁴³ "The Sovereignty of the Federal Government extends to the entire limits of our territory. . . . There is a law of Congress to punish our citizens, for crimes committed in districts of country where there is no organized Government. Criminals are brought to certain Territories or States, designated in the law, for punishment. Death has been inflicted in Arkansas and in Missouri, on individuals, for murders committed beyond the limit of any organized Territory or State"—Justice McLean, 60 U.S. at 543. It is presumably to these cases to which Justice Catron referred (as decided by him on circuit), when supporting, in his opinion in *Dred Scott v. Sandford*, Congress' power (whatever its source) in the territories—60 U.S. at 522-23. The cases fall within the political regulation of no *organized* territory; and are equally unexplainable as merely regulation of the "territory" (where the crime is either committed or tried) as soil; but can be explained, as he explained them, as an exercise over any and all territory of a sovereign power conferred by the rules-and-regulations clause.

"territory." But recur to Madison's two motions in the Convention.¹⁴⁴ Note that he made them as involving two distinct and separate powers. Note that in the rules-and-regulations sentence the *first* of Madison's motions was literally preserved, with an addition relating to non-landed property: "to dispose of . . . the territory or other property of the United States." Note that the words absent in his original motion—"and make all needful rules and regulations respecting"—can very readily be read as including a power "to institute temporary governments for new States," which last words constituted Madison's *second* motion. If in the Constitution there is any express grant of this last power, it was always admitted that such grant was by this rules-and-regulations clause. The power could, indeed, be found elsewhere by implication, being manifestly one of absolute necessity. But for that very reason, in the absence of any other provision that could be regarded as an express grant, the rules-and-regulations clause has been naturally—and as time passed, more and more generally—so read.

Some colonial history was involved in the use of the word "regulations." This ordinarily has a connotation, to us today, of detailed control under a general power or right. The colonies had long submitted without protest before the Revolution to "regulations" of trade and manufactures which not only involved restraints but sometimes the collection of imperial revenue. This made it difficult, when the Parliament proposed in 1767 to begin the collection of new duties on trade, to define the general right underlying the regulations against which no protests had been made. The colonists attempted a distinction between a right of Parliament to "regulate" and a right to "legislate." To find a logical basis for such a distinction was impossible, for whatever the Parliament did by statute was necessarily legislation. That was, indeed, the fundamental argument of the British. "It has been urged with great vehemence against us," wrote John Dickinson in *Letters from a Farmer*, "and it seems to be thought their Fort by our adversaries, that a power of regulation is a power of legislation; and . . . It is therefore concluded that the colonies by acknowledging the power of regulation, acknowledged every other power." He could not deny that they had acknowledged regulation by legislation. His counter argument amounted to this: that a right

¹⁴⁴ *Ante* at notecall 122.

to make *mere* regulations of trade was conceded, but not the right to make regulations that *amounted* to "internal" taxation; for this amounted to control of internal government, and without holding the purse strings in that—Dickinson warned his compatriots—"no free people ever existed, or can ever exist."¹⁴⁵ In short, they should repudiate any regulations which implied a right or a purpose that was essentially fiscal—or, perhaps, immediately political. As Professor McLaughlin emphasized many times, Dickinson was here grasping at distinctions between governmental powers which today seem quite simple to us in reading the Constitution but which were then only faintly discernible—as was more faintly still the federalism of which they are the indispensable basis—in British imperial administration.

The terminology involved in colonial controversies is perpetuated in the language of the Constitution. That adopted, as the substantive description of legislation, the very words—"rules" and "regulations"—which in earlier controversy the colonists had attempted to distinguish from legislation. In Article I, Section 8 of that instrument, in which are enumerated most of the powers given to Congress, one finds powers to "regulate" or "make rules" concerning commerce, money, captures on land and water, naturalization and bankruptcy, the army and navy;¹⁴⁶ each a limited, but vast, subject of legislation. The power to control the subject matter is given as a right to make rules

¹⁴⁵ Letter No. IX, *Political Writings* (1814), 1:224. Dickinson admitted at the outset that Parliament could rightfully "regulate trade," but denied the right to "tax"—Letter No. II, *ibid.* 1: 151-64. The latter word, he said, "had obtained a national, parliamentary meaning, drawn from the principles of the Constitution, long before *Englishmen* thought of *imposition of duties*, for the regulation of trade"—1: 176-77. This was the meaning the Congress had in mind in their resolutions adopted in New York; no tax without consent of those taxed, no tax on the colonies save by the colonial legislatures—1: 177-78. To tax is to *take* property. "External impositions, for the regulation of our trade, do not 'grant to his majesty the property of the colonies.' They only *prevent the colonies acquiring* property, in things not necessary, in a manner judged injurious to the welfare of the whole empire"—1: 179. The logic here was better than the words found to express it. As John Marshall said, "The colonies had been long in the habit of submitting to duties laid by parliament on their trade, and had not generally distinguished between those which were imposed for the mere purpose of regulating commerce, and this, which being also designed to raise a revenue, was, in truth, a real tax"—*Life of George Washington* (1805), 2: 76.

¹⁴⁶ Art. I, sec. 8, sub-secs. 3, 5, 11, 15 respectively. Similar illustrations are to be found in other state papers of the time. For example the Articles of Confederation (Art. 9) gave Congress the "power of . . . regulating the trade and managing all affairs with the Indians," and on Aug. 7, 1787 it passed "an Ordinance for the regulation of Indian Affairs."

and regulations respecting it; these words are an adequate and very acceptable description of the details of management. The right then existing, and Congress being the legislative department of government, the right would necessarily be exercised by making laws; that is, by legislation.¹⁴⁷ However, either the framers of the Constitution did not so reason or they indulged in tautology, for they followed its grants of specific powers with a general grant of power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, *and all other powers vested* ... in the government of the United States, or in any department or officer thereof."¹⁴⁸ Now, all the above-indicated powers are in one sense political; but they relate only in a mediate or indirect manner to political rights or the organization of government. When, on the other hand, Congress was granted in the same section of the Constitution the power of "exclusive legislation" over any territory purchased from the states for the seat of the federal government, and for public buildings and military establishments elsewhere,¹⁴⁹ this seems to have an implication of immediate and *general* governmental control.

Thus, the language of the Constitution, as above stated, seems to reveal a slight influence of pre-Revolutionary controversy. Consequently, in the Dred Scott case Chief Justice Taney perhaps had a point: "rules and regulations" alone had perhaps not been generally admitted to include regulations of basic political or governmental affairs. Still, the point is one of little weight. As a grant of power or right to control, the right to "make rules and regulations" is obviously, in logic, unlimited. Speculative comparisons with pre-Constitution polemics cannot affect the carefully chosen language of the Constitution. A concededly unlimited right to control the various mat-

¹⁴⁷ Justice Curtis, in his opinion in *Dred Scott v. Sandford* (1857) said of the rules-and-regulations clause: "But it must be remembered that this is a grant of power to Congress—that it is therefore necessarily a grant of power to legislate—and, certainly, rules and regulations respecting a particular subject, made by the legislative power of a country, can be nothing but laws"—60 U.S. at 614. This is sound reasoning, but there was no need to resort to implication since the clause cited in the next note covered the case. That is, it covered the case *provided* the "rules and regulations" power was of a nature to *require* legislation for its execution; particularly if it was a power over the political or governmental affairs of territories generally, as Curtis contended and Taney denied.

¹⁴⁸ Art. I, sec. 8, sub-sec. 18.

¹⁴⁹ *Ibid.* sub-sec. 17.

ters of vast governmental importance above specified was given Congress by using those very words.

Whether basic political or governmental matters are in any case involved depends on the nature of the subject to be regulated. The power described by the words cannot be restricted. Its incidence can, however, be restricted by proving a limitation on the subject matter to which it is applicable, or of the time within which it is exercisable. This was the objective to which Chief Justice Taney's argument in the *Dred Scott* case was primarily directed. In all cases the powers granted are to be executed by passing laws necessary and proper for the realization of the purposes intended. One essential question presented to the Supreme Court in that case was: Is the power over "the territory . . . belonging to the United States" general or limited, as respects time and as respects subject matter?

We may begin by considering all conceivable constructions of the power to make rules and regulations. At least five possibilities are theoretically available. Legislation by Congress would be necessary merely to protect the public property, provide for surveys, and provide for sales. In addition to such legislation, "necessarily associated with the disposition and sale of the lands," the establishment of territorial governments would require legislation of political character. Keeping in mind the distinction between enactments of these two types, it would be possible—*First*: to limit the power granted by the rules-and-regulations clause to regulations respecting a territory as landed property, making no distinction between it and the preceding power to "dispose of" public property save to restrict the latter exclusively to sales. This view leaves all power to govern territorial inhabitants to be derived by implication from some other express power. *Second*: following the reasoning of Justice McLean, everything might be deduced from the power to "dispose of" the land. For there must be enough government—executive, legislative, and judicial—to protect land and original purchasers, physically and through enforcement of contracts. But why should anyone purchase land if not to live on it, or to resell to others who would live on it?—and so on indefinitely. Thus a settled order of society would be necessary, including legislation by Congress binding on the inhabitants of the territory—legislation not confined in subject matter to the land as property. All this, however, could not well have been the intent of the Constitution's

framers, for it would have made wholly unnecessary the rules-and-regulations clause. *Third*: one could readily, by parity of reasoning, derive all power over the territory from the rules-and-regulations clause, both power to govern and power to dispose of the land. But such extension would even more plainly than under the last preceding construction violate the framers' intent. *Fourth*: the rules-and-regulations clause might be considered the source of all strictly political power in the government of the territories, leaving the "disposal" clause as the basis of all legislation regulating the survey, protection, and sale of the public lands. *Fifth*: one could regard the power to govern territorial inhabitants as deriving in part from the rules-and-regulations clause and in part, by implication, from other express clauses in the Constitution; particularly, perhaps, from that of admitting new states.

Illustrations of three of these views can readily be found. If one gives a literal meaning to words possibly unreflectively used, illustrations are abundant. Few of them merit attention. Justice Campbell, speaking in the *Dred Scott* case, concluded that the power conferred by the rules-and-regulations clause was "restricted to such administrative and conservatory acts as are needful for the preservation of the public domain, and its preparation for sale or disposition";¹⁵⁰ and he might have cited, though he did not, a dictum of the Court twelve years earlier which declared that the clause authorized such legislation. This is illustrative of the first of the above views. It was also the view of Calhoun and of Attorney General Wirt in 1820. John Quincy Adams tells us that when President Monroe, in anticipation of receiving from Congress the Missouri Compromise bill, requested of his cabinet members their written opinion of its constitutionality, Secretaries Calhoun and Crawford and Attorney General Wirt "insisted upon it" that the rules-and-regulations clause "had reference to it [the territory] only as land and conferred no authority to make rules binding on its inhabitants." Adams alone dissented, and reported the President as inclined to agree with him.¹⁵¹

The second and third views have probably never had any advo-

¹⁵⁰ 60 U.S. at 514. The dictum of the Court was given in *Pollard's Lessee v. Hagan* (1845), 44 U.S. 212, at 224; it was, that the regulations clause authorized "all laws necessary to secure the rights of the United States to the public lands, and to provide for their sale, and to protect them from taxation"—that is, by the Territories or States.

¹⁵¹ *Memoirs*, 5: 5, 8.

cases. The broad scope of such possible constructions has however often been casually indicated.

The fifth view is manifestly illogical. If the regulations clause authorizes any legislation whatever of a political character, it is idle to suggest any limitation upon it in view of the broad terms in which power is granted. Yet Madison expressed this view in 1819. "The terms of the grant," he wrote, "tho' of a ductile character, cannot well be extended beyond a power over the Territory as property, and a power to make the provisions really needful or necessary for the *Gov't of Settlers* until ripe for admission into the Union." The words "really needful or necessary" would certainly import a considerable restriction, but Madison gave no argument or evidence to support his opinion. He continued: "It may be inferred that Congress did not regard the interdict of slavery among the needful regulations contemplated by the constitution."¹⁵² Why so? The old Congress put the interdict into the Ordinance. The new Congress re-enacted that statute in order that it might "continue to have full effect,"—Madison and various other members of that Congress who had been members of the Federal Convention making no objection. Surely, then, "it may be inferred"—it *must* be inferred—that Congress *did* regard "the interdict of slavery among the needful regulations contemplated by the constitution." On this point one may well appeal from Madison at sixty-eight years of age, discomposed by the great Missouri debate, to Madison at thirty-five, interpreting the work of the Convention of which he had been the best informed and most efficient member.

The fourth view is that which the courts, and students of our constitutional system, have increasingly tended to adopt. This was Madison's view when his work in the Federal Convention had just been completed. It will be remembered that in Number 38 of *The Federalist*, when defending the grants and distribution of powers in the new Constitution, he declared that "effective powers must either be granted to, or assumed by, the existing Congress" of the Confederation, and he gave an illustration; namely, that in the matter of the western lands the absence from the Articles of Confederation of granted powers had put Congress under the necessity "of overleaping their constitutional limits" in proceeding "to form new States, to erect temporary governments, . . . and to prescribe the conditions on

¹⁵² Letter of Nov. 27, 1819, to R. Walsh—*Writings* (Hunt ed.), 9: 6.

which such States shall be admitted into the Confederacy." This is the plainest possible implication that in Madison's opinion the Constitution granted these "effective powers" and granted them expressly; to deny that is to charge that Madison was disingenuous. And the Constitution did in fact expressly grant the power to govern territories and admit new states if the rules-and-regulations clause was intended to authorize the institution of the territorial governments. Moreover, in Number 43 of *The Federalist*, where he commented upon the grants of power to Congress *seriatim*, he first, referring to the power to admit new states, recalled his earlier reference to the inconvenience of the omission of this power *from the Articles* "and the assumption of power into which Congress have been led by it"; and then, passing to the rules-and-regulations clause wrote: "This is a power of very great importance, and required by considerations similar to those which show the propriety of the former."¹⁵³ It seems reasonable to say that if Madison had believed that under the Constitution the power to govern the inhabitants of a territory was to be taken as implied in the power to admit a state formed therefrom, it would have been impossible to describe the rules-and-regulations clause as granting a power of "very great" importance. In Number 43, therefore, he must again be understood as implying that the clause empowered Congress to establish territorial governments.

The fourth construction of the clause is also unquestionably that intended by Gouverneur Morris, who wrote it. And since it was he to whom the task of the Committee of Style was primarily entrusted by his fellow committeemen, and Madison, one of them, conceded that to him "the *finish* given to the Style and arrangement" of the Constitution "fairly belongs,"¹⁵⁴ it seems certain that the phrasing of the provision was pondered, and well adapted to express his purposes. These were, it seems likely, three. It was necessary to find words satisfactory, as a compromise, to persons holding conflicting views (1) respecting the relation desirable between the Union and territory already acquired, and (2) respecting the proper treatment of any foreign

¹⁵³ Both of these essays have often been cited; but nowhere, seemingly, have the special purposes of Madison in No. 38 been noted, nor the relevancy of both with respect to the matter here in question.

¹⁵⁴ Letter of April 8, 1831, to Jared Sparks—Farrand, *Federal Convention*, 3: 499. On the extent to which James Wilson participated in the final revision there is a note in C. Warren, *Congress, the Constitution, and the Supreme Court* (2d ed. 1935), 8 n.

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territory subsequently acquired. That the conflicts on both these points were vital will appear clear later. Those on the first dictated the abandonment of Jefferson's ordinance of 1784, and fixed the character of the Ordinance of 1787¹⁵⁵—which was drafted while the Constitution was being framed. Morris's final purpose, (3) it is suggested, at least with reference to territory of the second type, was to slip into the Constitution here, precisely as he elsewhere did (as will be seen in a moment) in the provision for the admission of new states, his own views regarding foreign territory subsequently acquired. The generality of "rules-and-regulations" was, as already seen,¹⁵⁶ consistent with all other grants of power, and at the same time was ideal for Morris' purposes of compromise.

The opinion of Chief Justice Taney in the Dred Scott case takes us back to the first of the above possible views respecting the regulations clause. His arguments were three: (1) that the clause "applied only to the property which the States held in common at the time"; (2) that it conveyed merely a "power which was necessarily associated with the disposition and sale of the lands"; and (3) that "whatever construction may now [1857] be given to these words . . . they are not the words usually employed . . . in giving supreme power of legislation."¹⁵⁷

The light already thrown on the last of these contentions,¹⁵⁸ is sufficient to justify a statement that it was of little force. It was a borrowing from the distortions of pre-Revolutionary controversy, applied (and illogically applied) to the Constitution for purposes of special pleading. That the Constitution did expressly grant to Congress exclusive and unlimited powers over various subjects of paramount national interest, each of these powers necessarily a power of legislation, and its content in each case described as a right to make rules and regulations respecting it, were most assuredly facts perfectly clear to the mind of the Chief Justice.

As regards the other two contentions he had no historical evidence whatever in support of them; his views were based solely upon analy-

¹⁵⁵ *Post* cclxxxii seq. (particularly ccxcii-vii) and cccxiv seq. (particularly ccciv-lxi).

¹⁵⁶ Compare *ante* cvii-ix with *post* cxxv-ix, clvii-ix.

¹⁵⁷ 60 U.S. at 436-37; italics added. Exactly the same view was presented by Senator George F. Hoar of Massachusetts in argument on the Philippines, Jan. 9, 1899—*Cong. Record*, 55 Cong. 3 Sess., vol. 32: 497 (col. 1).

¹⁵⁸ Particularly by the very language of the Constitution—*ante*. cvii-viii.

sis of the clause's phraseology.¹⁵⁹ However, contrary opinions must rest upon the same basis. It is not practicable to discuss the two arguments separately. The Chief Justice did not so discuss them; he stated them separately but he gave no evidence that was only pertinent to them separately; he deduced both as conclusions from his general reading of the Constitution.

As regarded national chattel property of the type taken over by the Union from the Confederation—ships, arms, and munitions of war—but *subsequently* acquired, “no one, it is believed,” he said, “would

¹⁵⁹ On the first point he merely repeated assertions. “That provision . . . is confined, and was intended to be confined to the territory which at that time belonged to or was claimed by, the United States, and was within their boundaries as settled by the treaty with Great Britain, and can have no influence upon a territory afterwards acquired from a foreign government. It was a special provision for a known and particular territory, and to meet a present emergency, and nothing more”—60 U.S. at 432. “It applied only to the property which *the States* held in common at that time, and has no reference whatever to any territory or other property which *the new sovereignty* might afterward itself acquire. . . . It does not speak of *any* territory, nor of Territories, but uses language which, according to its legitimate meaning, points to a particular thing. The power is given in relation only to *the* territory of the United States—that is, to a territory then in existence, and then known or claimed as the territory of the United States”—*ibid.* 436-37; some italics added. Again, he said: “The necessity of this special provision”—the rules-and-regulations clause—“in relation to property and the rights of property held in common by the confederated States, is illustrated by the first clause of the sixth article. This clause provides that ‘all debts, contracts, and engagements entered into before the adoption of this Constitution, shall be as valid against the United States under this Government as under the Confederation.’ This provision, like the one under consideration,—that is, the rules-and-regulations clause—“was indispensable if the new Constitution was adopted. The new Government was not a mere change in a dynasty, or in form of government, leaving the nation or sovereignty the same, and clothed with all the rights, and bound by all the obligations of the preceding one. But, when the present United States came into existence . . . it was a new political body, a new nation. . . . *It took nothing by succession from the Confederation. It had no right, as its successor, to any property or rights of property which it had acquired, and was not liable for any of its obligations. . . . [Hence] special provisions were dispensable to transfer to the new Government the property and rights which at that time they [the confederated States] held in common; and at the same time to authorize it to . . . pay the common debt which they had contracted. . . . The clause in relation to the territory and other property of the United States provided for the first, and the clause last quoted”—that is, the prior-engagements clause—“provided for the other”—*ibid.* 441; italics added. The first clause could *transfer* nothing, and the second *authorize* nothing—see *post* n. 170.*

The fact that the new Union was created to arise only concurrently with the extinction of the old, and was its “successor” only in the sense of “following after,” is not always remembered; see the extraordinary remarks of Justice Sutherland in *United States v. Curtiss-Wright* (1936), 299 U. S. 304, at 315-18.

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think a moment of deriving the power of Congress to make needful rules and regulations in relation to property of this kind from this clause of the Constitution." Consequently, "upon any fair construction" the operation of the clause should be confined, as respected *such* property, to the property which was about to be transferred from the old Union to the new. "And if this be true as to *this* property, it *must* be equally true and limited as to the territory."¹⁶⁰

The argument is both ingenious and specious. "No one" is a very broad term. Of an ordinary citizen the statement would doubtless be true; the power to regulate would seem to him to be implicit in the fact of ownership—but, *nota bene*, equally as respected personal property then owned *or* thereafter acquired. Each of the Chief Justice's other propositions is vitiated by assumptions. Since the framers did in fact insert a power that "no one" would think necessary as respected personal property of the type in question, it is merely a self-serving assumption to declare that "fair" construction must confine that provision to property of that type then owned. To declare, next, that "if this be so"—which it was not, except by that assumption—"it must be equally true and [the provision equally] limited as to the territory" (landed property), was merely a second self-serving assumption. As a matter of fact nothing in legal history is plainer than that men have always thought differently of movable and immovable property. And both of these double-tongued propositions were dependent on a third self-serving assumption more egregious and factitious than the other two; namely, that a Chief Justice, and the framers of a Constitution who were wisely intent upon creating a government of enumerated and strictly limited powers, could or should have thought as an ordinary citizen would think. In fact, however, as we have just seen, the care taken by the framers in stating explicitly each power given to the new federal government was so great as to involve in the conferment of every power granted in the eighth section of the first article a defect very rare in the Constitution—redundancy. An ordinary citizen would have thought that giving Congress a power to rule and regulate this or that was itself a sufficient grant of power to legislate on the subject; but not so the framers. An ordinary citizen might well think that ownership of property would necessarily include powers to legislate regarding it; still, one should not assume that the

¹⁶⁰ 60 U.S. at 436-37.

framers would or should have thought thus. Their duty, in law and as they saw it, was to put beyond doubt the exact powers granted;¹⁶¹ so they granted each power of legislation necessary to carry out the powers already granted; and even then much was left, as the future proved, to implication. Again it is difficult to believe that Chief Justice Taney could have been oblivious to the distinctions just made.

There are other objections to his view. He was not justified, when construing the regulations clause, which is the second sub-section of Article IV, in totally disregarding the first sub-section, which provides for the admission of new states. Such a separation could not, by him, be logically made. For he tied together power to acquire territory and power to admit new states—limiting the existence of the power to the presence of that end.¹⁶² And he further insisted that power to acquire includes large powers to govern.¹⁶³ Consequently, in interpreting the power to govern he could not consistently wholly disregard his interpretation of the power to admit;—but he nevertheless did that, expressly.¹⁶⁴ Now, nobody had ever suggested that the sub-section on new states was inapplicable to the territory *later ceded* by North Carolina and Georgia, the cession of which was in 1787 only confidently anticipated. If that clause was applicable to after-acquired territory, why was not the rules-and-regulations clause equally applicable to the same after-acquired territory? And why not, then, to after-acquired territory in general?

The Chief Justice evaded these questions in a very illogical manner. The constitutional provision under examination ends with a saving of “any claims of the United States, or of any particular State.”¹⁶⁵ This, said he (and nobody has ever expressed a contrary opinion), referred to the claims of the respective parties to the western lands of North Carolina and Georgia, “*not yet ceded by the States*” named.¹⁶⁶ On the preceding page of his opinion, moreover,

¹⁶¹ *Ante* xcvi, ci.

¹⁶² *Ante* n. 117.

¹⁶³ *Ante* cii-iii.

¹⁶⁴ 60 U.S. at 446-47.

¹⁶⁵ *At notecall* 127.

¹⁶⁶ 60 U.S. at 437. The Confederation had *bound itself* respecting this unceded territory by its compact with Virginia—*ante* at notecall 53. But that was no compact with North Carolina and Georgia, and much less did it effect a cession, although Chief Justice Taney here illogically treated it as if it did. Neither did it constitute an express grant of power to perform the obligation assumed—compare *ante* lxxv, xciv.

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speaking of the regulations clause, he first stated that its purpose was only "to transfer to the new Government property *then held in common* by the States" (he did not mean, literally, that the clause was only a *conveyance*), and a few lines farther on stated that it was "given in relation only to *the* territory of the United States—that is, to a territory then in existence, and then known *or claimed* as the territory of the United States."¹⁶⁷ Here, then, he ignored the fact that the Southwest had not been ceded, and as a territory of the Union was only claimed, but did not exist. He did this to indicate that nevertheless the regulations clause was applicable to that territory when acquired. Yet, ignoring this, he immediately based upon the reserved-claims provision an argument that denied the possibility of this construction just given by him to the regulations clause. He said, namely :

When the latter provision [the reserved-claims clause] related so obviously to the unappropriated lands *not yet ceded* by the States, and the first clause [the regulations clause] makes provision for those *then actually ceded*, it is impossible, by any just rule of construction, to make the first provision general, and extend it to all territories, which the Federal Government might in any way afterwards acquire, when the latter is plainly and unequivocally confined to a particular territory, and involved in the same dispute, [between individual and confederated states] and depended upon the same principle.¹⁶⁸

Just what idea was intended to be conveyed by the last five words of this passage cannot be said. It is true that the prior-engagements clause of Article VI, and the new-states clause and regulations clause and reserved-claims clause of Article III, were the solution, all taken together, of one great dispute. It is not clear how they depended "upon the same principle," and certainly the Chief Justice did not construe them on a common principle of consistent reasoning. He set no limit to the operation of the new-states clause upon after-acquired territory save that territory could only be acquired for the purpose of its ultimate admission as a state;¹⁶⁹ he did not question its applicability, therefore, to the unceded Southwest. As regards the rules-and-

¹⁶⁷ *Ibid.* at 436. The territory in the Southwest was not yet acquired unless one assumes that the Confederation's claim thereto under the treaty of peace was superior to that made by the states, and Taney's words negative this view. See *ante* lxi-ii. That "transfer" improperly implies that the regulations clause *itself* effected a *conveyance*, see *post* n. 170.

¹⁶⁸ 60 U.S. at 437-38; italics added.

¹⁶⁹ *Ibid.* 446-49.

regulations clause, at one moment he conceded its applicability to that unceded domestic territory—the only territory which he and many others thought could be constitutionally acquired. At another moment he denied any applicability of the clause to territory not already owned in 1787 by the confederated states. Indeed, in one passage (but surely by mere inadvertence) he made it nothing but a conveyance of property, with *no* efficacy thereafter.¹⁷⁰ But since in this last case, regardless of that slip, he was seeking the meaning of the regulations clause by comparing the provisions of two Articles, III and VI, it seems indeed strange that he should have failed to compare for that purpose the different sections of Article III.

On the whole, there seems again to be nothing better in the Chief Justice's reasoning than an assumption of a desired conclusion, buttressed by an assertion that any other construction of the Constitution was "impossible" and a further statement that his own argument was "irresistible."

Even though the reserved-claims clause did refer to particular territory, it was a reference to territory to be acquired in the future. Moreover, it covered all later-acquired territory to which reference was either discreet or necessary. Hence, the new-states clause and the rules-and-regulations clause being both unlimited in form, there is no reason why the restriction of the reserved-claims clause (explainable by reasons peculiar to itself) should be permitted in any way to restrain the meaning of these clauses that preceded it.

There are still other objections to the Chief Justice's view, and weightier ones, than these criticisms of his exegesis of the Constitution's text.

The first reason is based upon the circumstances that surrounded the framers of the Constitution. It was thus stated by Justice Curtis:

¹⁷⁰ The reserved-claims clause is quoted *ante* at notecall 127; the prior-engagements clause is quoted *ante* n. 159. Taney's statements in n. 159 respecting the latter clause and the rules-and-regulations clause are, if read literally, manifest absurdities. The territory of the old Union was *transferred* to the new only as stated *post* cxx. The regulations clause gave power to deal with it. The prior-engagements clause imposed on the new Union the *obligation* of the old respecting that territory, and the powers necessary for their performance were conferred in sec. 8 of Art. I of the Constitution. To construe the clause as itself a grant of power was therefore unnecessary, and also (*ante* lxxiv-v, lxxxvii) wholly illogical. (If Taney's phrases "the first" and "the other" be reversed the absurdity of his propositions is lessened, since the regulations clause *did* empower Congress "to dispose of" the territory, and so to pay debts.)

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“There is very strong reason to believe . . . that the necessity for a competent grant of power to hold, dispose of, and govern territory, ceded *and expected to be ceded*, could not have escaped the attention of those who framed or adopted the Constitution; and that if it did not escape their attention, it could not fail to be adequately provided for.”¹⁷¹ The clause in question is in form a provision adequate for that purpose. The Chief Justice’s reasons for restricting it in meaning are not convincing.

The second reason is that, so far as concerns the intent of Gouverneur Morris, unquestionably the clause was intended to cover after-acquired property, as will shortly appear.

The Chief Justice maintained, also, that his narrow construction¹⁷² of the first clause was confirmed “by the manner in which the present Government of the United States dealt with the subject as soon as it came into existence.” “It is obvious,” said he,

from the law they passed to carry into effect the principles and provisions of the ordinance, that they regarded *it* as the *act of the States* done in the exercise of their legitimate powers at the time. The new Government took the territory as it found it, and in the condition in which it was transferred, and did not attempt to undo anything that had been done. And, among the earliest laws passed under the new Government is one reviving the ordinance of 1787, which had become inoperative and a nullity upon the adoption of the Constitution. This law introduces no new form or principles for the government, but . . . proceeds to make only those *rules and regulations* which were needful to adopt it to the new Government, into whose hands the power had fallen.¹⁷³ It appears, therefore, that this Congress regarded *the purposes* to which the land in this Territory was to be applied, and the form of government and principles of jurisprudence which were to prevail there while it remained in the Territorial state, as already determined on *by the States* when they had full power and right to make the decision; and that the new Government . . . ought to carry substantially into effect the *plans and principles* which had been previously adopted by the States, and which [that is, action by the Govern-

¹⁷¹ 60 U. S. at 618; italics added.

¹⁷² The same view had been expressed on the Circuit Court by Justice Johnson in *Amer. Insur. Co. v. Canter* (1828), 1 Pet. (26 U.S.) 511, footnote on 517. His decision was affirmed by the Supreme Court, 1 Pet. (26 U.S.) 511, but the question, as Taney says, was there not decided (cf. *ibid.* 542) “because a decision upon it was not required by the case before the Court”—*Dred Scott v. Sanford* (1857), 19 How. (60 U.S.) 383, 442-44.

¹⁷³ Act of Aug. 7, 1789—*U. S. Stat. at Large*, 1: 50-53; reprinted from original, with corrections, in Carter, *Territorial Papers*, 2: 203.

ment] no doubt the States anticipated when they surrendered their power to the new Government.¹⁷⁴

The new Union "took" the territory from the old through the Constitution; by it the people created a new Union, and destroyed the old; officials of the one received from those of the other custody of Union property; but there was no cession by one government to the other, and no compacts between *them* regarding it.¹⁷⁵ But, by the Constitution the new Union assumed "all . . . engagements entered into" by the old. The question then is: What had been done by the Confederation?

Taney was here arguing the narrow meaning of the rules-and-regulations clause. So far as he could show that the Ordinance, when passed in 1787, was *the act of the sovereign states*, as such, he would correspondingly narrow its legislative content and equally restrict the field left *open* to legislation by the new Congress following 1789. If all the provisions of the Ordinance were compacts between Virginia and the Confederation, then the new Union *must* have taken the Northwest Territory and its governmental system "as it found" them, and *could* not have undone anything that had been done. At least as respects the Northwest Territory, the operation of the rules-and-regulations clause would have been exceedingly restricted. The narrowness of that clause's application in adjusting the Ordinance to the governmental framework of the new Union in 1789¹⁷⁶ would have illustrated its *inherent* limitations, and could not be explained as indicative merely of a willingness to leave substantively unaltered an instrument found to be in that respect satisfactory.

The vice in this argument is that it was *not* "*the Ordinance*" that was the act of the sovereign states. It was, as his language just preceding the passage above quoted clearly shows, *certain interstate*

¹⁷⁴ 60 U.S. at 438-39; italics added. Compare the following discussion with *post* clxxxix-xcii.

¹⁷⁵ There was a "giving" by the old Union and a "taking" by the new in a physical sense only. In a legal sense, it would seem, the people of the states that composed the Confederation destroyed the title to the territory that was in that Union and created a new title in the new Union, by virtue of approval in the several state conventions of the prior-engagements clause of the Constitution. See *ante* n. 170.

¹⁷⁶ Namely: officials of the Territory to be appointed by the "President" instead of (the old) "Congress"; removals from office, ditto; reports by the governor, ditto; the secretary of the Territory to serve as governor in case of the latter's removal, resignation, or absence from the Territory.

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compacts preceding and underlying that enactment that were their acts;¹⁷⁷ and, as he likewise elsewhere showed, it was only these compacts that were made binding on the new Union by the Constitution.¹⁷⁸ It was only within their limits that the status of the territory, *de jure*, under the Confederation, was involved in the fact that the new Union took the territory from the old, and in the manner of its taking.

It is certain that the members of Congress who were familiar with the years-long negotiations between Virginia and her sister states should have understood correctly the nature of the agreements finally made between them, and the distinction between those compacts and the provisions of the Ordinance. If they did, then the members of the First Congress likewise presumably understood how far that instrument was in fact "the act of the States done in the exercise of their legitimate powers at the time." But no matter what they may have thought on the subject it is clear that all the detailed governmental provisions of the Ordinance were mere legislation, and their continuance rested in the discretion of the new government. Likewise, the Ordinance's declarations of high political policy in the "compact" articles, so far as they were not echoes of the Constitution,¹⁷⁹ had no higher character, as will be shown in the next section of this introduction. The Chief Justice could not have forgotten that he himself had pronounced "many" of the Ordinance's provisions to be contrary to the Constitution.¹⁸⁰ If in fact it had been the act of the sovereign

¹⁷⁷ They are stated above as they stand in the acts of Virginia and of Congress—*ante* xci; for their detailed statement by those parties see citations *ante* nn. 62, 63.

¹⁷⁸ 60 U.S. at 435, 441; the passage on 441 is quoted *ante* in n. 159. It has often been assumed that this prior-engagements clause referred to financial obligations of the Confederation only. The explanation of this is that the purpose of the clause was instantaneously executed, that no occasion arose to interpret it in the early years of the Union, and that its significance was forgotten.

St. George Tucker, in his edition of Blackstone (1803), suggested that the six "compact" articles of the Ordinance of 1787 were confirmed by the constitutional clause under discussion ("These articles appear to have been confirmed," etc.)—Vol. 1, part 1, Appendix at 279. Senator Benton, who studied Tucker's edition as a beginner in law, quoted him in his *Historical and Legal Examination of the Dred Scott Case*, at 52, but made the whole Ordinance an "engagement" that was so confirmed—*ibid.* 50-53; and Benton, *Thirty Years' View* (1856), 2: 759. This led to other more objectionable views—*post* ccxvi-vii, ccxx-xxi.

¹⁷⁹ *Post* clxxxi-ii and nn.

¹⁸⁰ "It is impossible to look at the six articles"—the "compact" articles—"which are supposed, in the argument, to be still in force, without seeing

states, all of its provisions would have been compacts between each of them and all the others—that is, the Confederation; all would have been confirmed by the prior-engagements clause of the Constitution; none could have been contrary to it.¹⁸¹ The history of the Ordinance in the time of Taney's leadership of the Supreme Court reveals the absurdity of this last view and the correctness of the other.¹⁸²

In short, there is nothing whatever "in the manner in which the present Government of the United States dealt with the subject as soon as it came into existence" which to the slightest extent supports Taney's attempt to explain how the original Ordinance could stand in its entirety, *after* adoption of the Constitution, as the act of the sovereign members of the Confederation, and the new Congress nevertheless lack power to act similarly with respect to other territories. The passage just commented upon is not a coherent and positive argument; it can fairly be characterized as a series of allusive suggestions, each capable of, and indeed inviting, misconstruction. The only legal judgments that re-enactment of the Ordinance could, and did, imply were: first, that, as the Chief Justice had just before said, "as this league of States would, upon the adoption of the new Government, cease to have any power over the territory, and the ordinance . . . be incapable of execution, *and a mere nullity*," it was necessary "to give the new Government sufficient power to enable *it* to carry into effect" the objects for which the territory had been ceded;¹⁸³ and second, that the First Congress, including twenty-two members who had aided in framing the Constitution, assumed that its power *thereunder* was sufficient to justify re-enactment of the Ordinance with no changes of

at once that many of the provisions contained in them are inconsistent with the present Constitution"—*Strader v. Graham* (1850), 51 U.S. 82, at 95.

¹⁸¹ Had the Ordinance been of the nature supposed, it would necessarily, as supposed by its eulogists, have settled absolutely the problem of slavery in the Northwest, and therefore also, as a matter of practical political fact, as respected all new states whose creation was foreseeable, since no affirmation of slavery in the Southwest was necessary and no disaffirmance of it therein could be anticipated. And the Constitution would then have affirmed the Ordinance *in toto* as engagements entered into by the Confederation (Art. VI, sec. 1); which was never directly claimed by anybody, although implicit in the language of various commentators.

Senator Benton reached the same result, as respects the Ordinance's supposed abolition of slavery by his extraordinary theory of the source of congressional power stated *ante* at notecall 121; see his *Dred Scott Case*, 34-35, 37.

¹⁸² Compare *post* cxxx, ccxv-xxii, ccxlvii-viii.

¹⁸³ 60 U.S. at 435.

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substance in its provisions. The last argument of the Chief Justice thus appears to have no solidity.

Having removed the confusion respecting the rules-and-regulations clause which was involved in Taney's reference to the re-enactment of the original Ordinance by Congress in 1789, it seems desirable to remove further confusion created by disregard of the true relation between the original Ordinance and the Constitution.

It is a fact that the expiring Congress of the Confederation *acted* in the matter of the Ordinance as if it possessed powers co-ordinate with those of the Federal Convention.¹⁸⁴ No less a claim than that was involved in the enactment of its ostensible compact clauses; and if that enactment, in its entirety, had been the act of the sovereign confederated states, as Chief Justice Taney's territorial arguments required, the claim would have been fully justified. Essentially the same ideas as those above expressed by him were expressed by Justice Campbell. Said he:

The consent of all the States represented in Congress, the consent of the Legislature of Virginia, the consent of the inhabitants of the Territory, all concur to support the authority of this enactment. It is apparent, in the frame of the Constitution, that the Convention recognized its validity, and adjusted parts of their work with reference to it. The granting of authority to admit new States into the Union, the omission to provide distinctly for Territorial Governments, and the restriction of the clause limiting the foreign slave trade to States then existing, which might not [themselves] prohibit it, show that they have regarded this Territory as provided with a Government, and organized permanently with a restriction on the subject of slavery. Justice Chase . . . says of the government before, *and it is in some measure true during the Confederation*, that "the powers of Congress originated from necessity, and arose out of and were only limited by events, or, in other words they were revolutionary in their very nature. Their extent depended upon the exigencies and necessities of public affairs";¹⁸⁵ and *there is only one rule of construction, in regard to the acts done, which will fully support them*, viz.: that the powers actually exercised were rightfully exercised, wherever they were *supported by the implied sanction* of the State Legislatures, and by the ratifications of the people.¹⁸⁶

¹⁸⁴ Compare E. C. Burnett, *The Continental Congress*, 690-93; Benton, *Dred Scott Case*, 38, 91.

¹⁸⁵ In *Ware v. Hylton* (1796), 3 U.S. (3 Dall.) 199, 232.

¹⁸⁶ 60 U.S. at 504.

Whatever force this reasoning had rests on the assumption in the first and last sentences that mere "consent" could give the Ordinance compact character. The Ordinance would be, as Taney said, "a mere nullity" when the Confederation expired, unless it was (as he also very inconsistently implied it to be) in every line and letter an interstate compact. It would then have been validated *in toto* under the prior-engagements clause (instead of the simple compacts underlying it), and the Convention *could* have "recognized, and adjusted parts of their work with reference to it," thus making it in effect a part of the Constitution. But, of course, there is no shadow of support for this theory. It has been shown that the Ordinance did not have the character supposed, and it is a question merely of fact.

But now consider the actual compacts, underlying the Ordinance, that *were* made valid against the new Union. The sovereign states having empowered the Confederation to acquire territory, organize governments therein, and admit new states therein formed, and the old Congress having actually exercised only the first two powers—an *ordinary citizen* might have supposed that the third power, to admit new states, was the only one for which provision was necessary in the new Constitution, as in fact it was the only one expressly granted. But how could any delegates have reasoned thus when the Convention was *enumerating* the powers of the new federal government? Or any lawyer reason so, retrospectively? Existence or nonexistence of any power in, and exercise or nonexercise of any power by, the Confederation was totally irrelevant to the question of its existence in the new government under the Constitution.

Of what force, then, are the opening and concluding sentences of Justice Campbell's theory? Manifestly none. Mere nonprotestant "consent" of all the parties named could give the Ordinance no authority beyond the interstate compacts that were its basis; beyond them, there was no formal action by the states. The conditions upon which Virginia ceded the Northwest were enumerated in her legislative act and were re-enumerated and explicitly accepted for the Confederation by the delegates of the other contracting states by a similar act (in Congress), and nothing in the Ordinance that lay outside the terms of the compact thus made can be viewed as extending that compact merely because the excess was not denounced and repudiated by parties who had no power either to enact or repeal it. It was

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wholly acceptable as mere legislation subject to alteration and abrogation by Congress. The theory of Justice Campbell reads like an appeal to public sentiment in the decade of squatter-sovereignty. Were it sound, it goes, as already said, too far; it would give every provision of the Ordinance a super-Constitutional status.¹⁸⁷ None knew better than Justice Campbell that the Ordinance had never been so regarded in the Supreme Court.

Thus, there was no legal relation whatever between Ordinance and Constitution, and therefore no substance—only confusion—in the argument of Justice Campbell. The Ordinance was merely a statute. Its only relation to the Constitution, aside from that of being constitutional or unconstitutional, was that some mutual influence of opinion existed between the framers of the two instruments. This was inevitable, since they were at work at the same time, faced the same problems, to some extent had a common membership, and clearly had some knowledge of each other's acts and attitudes.

It may again be repeated that there was really nothing peculiar in the phraseology "rules and regulations." It was the form employed in granting to Congress several of its greatest powers. Each specific power given it was one to make "rules and regulations," and in the form of "all laws necessary and proper" for the stated purpose. Variation existed only in the subject matters of which control was given; not in the fullness of the power given, nor in the words by which the power was given. We have concluded that the subject matter was not the Northwest Territory—one territory—but territories generally; the government of territorial inhabitants as well as the control of the territory as property. The scope of permissible rules and regulations would therefore, *prima facie*, be very great.

We have seen that the first bulwark behind which Chief Justice Taney took his position was the contention that "rules and regulations" connoted the details of managing territory as property. The last bulwark was a contention that "whatever construction may now [1857] be given to these words," it must exclude a government unrestrained by the restrictions to which congressional power, *outside* the territories, was admittedly subject; that is, arbitrary or despotic government. But it is perfectly clear from what has gone before that although, in employing the phrase "rules and regulations," the drafts-

¹⁸⁷ *Ante* n. 181.

man of the constitutional provision, Gouverneur Morris, was merely adhering to the Constitution's standard form in granting powers, he had a special reason for doing so; namely, that in his opinion it *would* permit arbitrary imperial forms of government, at least over any foreign territory subsequently acquired.

Doubtless other members of the Convention than Hamilton and Morris shared the view that the eventual acquisition of at least all foreign territory east of the Mississippi—possibly some farther south—was inevitable.¹⁸⁸ Doubtless a large number would have shared the opinion, as did Chief Justice Tancy¹⁸⁹ and a long list of other Americans up to 1898, that Congress could not permanently govern a territory as such; that it could govern it only antecedently to and as a preparation for admission as a state.¹⁹⁰ It followed, necessarily, that under this view territory could be acquired solely for the purpose of later organization into states. Jefferson, in 1803, saw no constitutional difficulty in acquiring Louisiana, but its incorporation into the Union was, he thought, "a question of expediency," and he thought it "safer not to admit the enlargement of the Union" (that is, by the incorporation of foreign territory, for all domestic territory had already been incorporated) "but by amendment of the Constitution." In other words, the power to admit new states was in his opinion limited to those "which should be formed out of the territory [of the confederated states], for which, and under whose authority alone, they were then acting."¹⁹¹ Morris saw no limitation on our ambitions respecting

¹⁸⁸ Hamilton's ambitions in 1797 when he was head of the army and expecting war with France and Spain were very great. Speaking, seemingly, of any and all territory of France and Spain in America coveted by the United States, he wrote: "I have been long in the habit of considering the acquisition of those countries as essential to the permanency of the Union." Just what countries were coveted is not apparent, but he entertained ideas of organizing revolts south of Panama—J. T. Morse, *Life of Alexander Hamilton* (1876), 2: 267-68. Five years later he wrote to Pickering: "I have always held that the *unity of our empire* and the best interests of our nation require that we shall annex to the United States all the territory east of the Mississippi, New Orleans included"—Dec. 29, 1802, *Works* (Lodge ed.), 10: 445. The number of leading men holding this latter opinion was probably very considerable.

¹⁸⁹ 60 U.S. at 446-48.

¹⁹⁰ Senator Hoar, discussing in 1902 the disposition of the Philippines, has been quoted as saying: "I have been unable to find a single reputable authority more than twelve months old, for the power claimed for Congress to govern dependent nations or territories not expected to become States." I have failed to find this in the *Congressional Record*.

¹⁹¹ Letters to Gallatin, Jan. 1803, and to W. C. Nicholas, Sept. 7, 1803—*Writings* (Ford ed.), 8: 241, 247; Gallatin, *Writings* (Adams ed.), 1: 114.

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foreign territory save divine interposition. To him, the idea that its acquisition should be subjected to restraints imposed by a goal of ultimate statehood in a democratic Union would never have occurred. As regarded the permanent government of such territory he had likewise no hesitations. In a letter of later years he wrote:

I am very certain that I had it not in contemplation to insert a decree *de coercende imperio* in the Constitution of America . . . I knew as well then [1787] as I do now, that all North America must at length be annexed to us. Happy, indeed, if the lust of dominion stop there. It would therefore have been perfectly utopian to oppose a paper restriction to the violence of popular government.¹⁹²

And in reply to an inquiry "whether the Congress can admit as a new State, territory, which did not belong to the United States when the Constitution was made," he replied:

In my opinion they cannot. I always thought that, when we should acquire Canada and Louisiana, it would be proper to govern them as provinces, and allow them no voice in our councils. *In wording the third section of the fourth article, I went as far as circumstances would permit to establish the exclusion.* Candor obliges me to add my belief, that, had it been more pointedly expressed, a strong opposition would have been made.¹⁹³

These oft-quoted letters compel several conclusions. One is that the rules-and-regulations clause, far from referring as Chief Justice Taney thought solely to the territory northwest (and southwest) of the Ohio, was understood by its draftsman to cover, and in a peculiar sense refer to, foreign territory subsequently acquired.¹⁹⁴

Another conclusion is that neither that clause nor the reserved-claims clause was intended to be a grant of power to acquire territory.

¹⁹² Letter to H. W. Livingston. Nov. 25, 1803—Farrand, *Federal Convention*, 3: 401.

¹⁹³ *Ibid.* 404; italics added. In a letter to Timothy Pickering in 1814, Morris wrote: "That instrument was written by the fingers, which write this letter. Having rejected redundant and equivocal terms, I believed it as clear as our language would permit; excepting, nevertheless, a part of what relates to the judiciary. On that subject, conflicting opinions had been maintained with so much professional astuteness, that it became necessary to select phrases, which expressing my own notions would not alarm others, nor shock their self-love, and to the best of my recollection, this was the only part which passed without cavil"—Dec. 22, 1814, Farrand, *Federal Convention*, 3: 420.

¹⁹⁴ One could possibly make a stronger argument that it was intended to refer solely to future acquired territory than Taney made for the view that it applied solely to territory already acquired.

In any explicit grant some delegates would certainly have demanded some restriction; either based on the distinction between domestic and foreign territory or involving the ultimate denial or grant of statehood. Hence, since in Morris' opinion any restriction would be ineffective and, if it caused debate on the distinctions named, undesirable, the only way to avoid those issues was to employ words so vague as not even to suggest by implication any enabling content. In this he was, it would seem, completely successful.

As for the government of territory acquired, since in his opinion foreign territory *could* not be formed into states, all the phraseology associated in debates of the Confederation era with the Northwest Territory ("organization" or "creation" or "erection" of "governments" or "states") was therefore also to be avoided in order not to raise *that* issue. This objective, too, was attained, and Morris' private opinion respecting the proper treatment of foreign territory was also perfectly expressed, by the phrase "rules and regulations."

Exactly the same is to be said of the provision that "new States may be admitted by the Congress into this Union." This clause is part of the section of which, as a whole, Morris stated that he had gone "as far as circumstances would permit to establish the exclusion" from statehood of acquired foreign territory. As already noted, debate in the Convention was devoted wholly to other clauses involving the problems of Kentucky, Maine, and Vermont.¹⁹⁵ There seems to have been no mention of the more fundamental problems presented in 1803 by the annexation of Louisiana.¹⁹⁶ In drafting his compromise

¹⁹⁵ See *Ante* xciv-v, xcvi.

¹⁹⁶ The Louisiana treaty provided for the organization of new states in the ceded territory. On Nov. 4, 1803, Rufus King wrote to T. Pickering: "Congress may admit new States, but can the Executive by treaty admit them, or, what is equivalent, enter into engagements binding Congress to do so? As by the Louisiana Treaty, the ceded territory must be formed into States, & admitted into the Union, is it understood that Congress can annex any condition to their admission?" Farrand, *Federal Convention*, 3: 399.

Thus, by 1803 the three fundamental problems that have caused so much debate were all plainly in view: the uncertain line between executive and congressional power, the question whether foreign territory may or must be admitted to the Union, and the question whether Congress can create inequalities between the states by imposing different conditions upon them when admitted. The last has been answered negatively—*post* clxii-iii. Toward solution of the first problem little progress has been made. As for the second, though practice has tended toward the recognition of "unincorporated territory," it has not done more than accentuate the question whether permanence of such a status is consistent with our ideals or our safety.

provision Morris was successful in avoiding words that would raise any question respecting foreign territory.

An attempt has been made in the preceding pages to show that the rules-and-regulations clause was in the usual phraseology by which various of the greatest powers held by Congress were granted in the Constitution; that the right of control over the subject matter of the power—"territory or other property of the United States"—which is given by the clause is to be taken, *prima facie*, as virtually unlimited, since that is manifestly true of the power granted to Congress by the same words, in the same section of the Constitution, over various other subjects; that the power itself being in terms unrestricted, its incidence can be restricted only by a narrow construction of the above description of the subject matter to which it is applicable or of the time within which it was intended to be exercisable; that the attempt of Chief Justice Taney to prove its limitation to territory simply as property, and to property already owned by the Confederation in 1787, was unsupported as to both points by any direct historical evidence, and as an argument was illogical and full of self-serving assumptions; that, on the contrary, the view that the clause was intended by its draftsman as a general grant of power to govern the inhabitants of territories is amply proved, and that Madison so understood it in 1788 is fairly to be inferred from his arguments in *The Federalist*: that Chief Justice Taney's further argument that the Ordinance of 1787 was the act of the sovereign confederated states, binding on the new Union and Congress—which if true would have left only a very narrow field within which Congress could act under the clause—was wholly fallacious, the actual compacts between Virginia and the Confederation being quite plain in the state papers of the time, and confined to specific agreements which preceded and underlay the Ordinance as its basis, but did not include any of its provisions; that although the Congress of 1787 labeled various of those provisions "compacts," they necessarily remained mere legislation, nor was their nature in any wise altered by the co-ordination which to some extent is apparent in the work of drafting the Ordinance and the Constitution; and, finally, that at least in the intent of the draftsman of the rules-and-regulations clause the powers it conferred were judged sufficiently broad to permit Congress to govern imperially, as perpetual dependencies, any foreign territory that might be acquired by the Union.

We now pass to a very different question with respect to the legislative power of Congress in the territories. The preceding discussion has dealt with one constitutional clause as the source of such power. But regardless of the source, the existence of a large measure of control was never questioned. The question next raised is whether there are constitutional limits to that control.

VI

This was the problem before the Supreme Court in *Dred Scott v. Sandford* (1857). Stated in general terms the question was one as to the possession by Congress of a power to regulate the rights of person or property of territorial inhabitants; more specifically, whether it could prohibit slavery in a territory carved out of the Louisiana Purchase. Legally stated this involved the question whether it could alter the property rights of the master of an African slave taken by (or for) him into the territory.

The Northwest Territory and Ordinance of 1787 were not directly involved; but they were much discussed, since slavery had there supposedly been excluded either by interstate compacts or by legislation. In earlier cases which were quoted with approval by the Court in the *Dred Scott* case, it had been held, quite soundly, that the supposed compact articles of the Ordinance were not compacts;¹⁹⁷—although there were still dissenters from that view, in and outside the Court.¹⁹⁸ Hence, if slavery had been excluded, it was by mere legislation. In the *Dred Scott* case the Court held that Congress had no such legislative power. Whether that decision was sound will now be considered.

Seven years before the decision in the *Dred Scott* case it had been decided in *Strader v. Graham* (1850) that no matter what might be the

¹⁹⁷ *Post* ccxv-xviii, ccxxi-ii.

¹⁹⁸ Justice Catron, in his opinion in *Dred Scott v. Sandford* (1857), 60 U.S. at 523, said: "As to the Northwest Territory, Virginia had the right to abolish slavery there;"—but she could not have done so *irrevocably* by a mere vote of her legislature—"and she did so agree in 1787, with the other States in Congress . . . by assenting to and adopting the ordinance of 1787." Only on an assumption that all the state delegates acted under instructions to bind their states by compact could the vote on the Ordinance have more than a legislative effect. But Justice Catron had absolute abolition in mind.

Thomas Hart Benton, in his review of the *Dred Scott* case, also declared that the Ordinance "settled" the question of slavery in the Northwest Territory—*ante* n. 181.

effect upon a slave's status of residence within the Northwest Territory (either while the Ordinance was in effect or after a prohibition of slavery by the constitution of free states organized within that Territory), if he thereafter became a resident of a slaveholding state his status would again be subject to change by decision of the latter. It might, out of comity, recognize a free status, assuming such to have been acquired; or it might refuse to recognize it.¹⁹⁹ The Supreme Court might simply have followed this decision in the Dred Scott case, although there were reasons of procedural propriety for not doing so. It chose not to evade political and constitutional problems by so doing.

In the latter case it made three decisions.²⁰⁰ Six of the nine members held that a Negro descended of African ancestors imported and sold as slaves (and this may be assumed true of all Negroes then in the country) could not become a citizen of the United States. The same majority held that the Missouri Compromise—which ostensibly abolished slavery in that portion of the Louisiana Purchase north of 36°30', where Dred Scott had resided—was void, because Congress had no power to exclude slavery from the territories.²⁰¹ Finally, after

¹⁹⁹ *Strader v. Graham* (1850), 51 U. S. (10 How.) 82.

²⁰⁰ *Dred Scott v. Sandford* (1857), 60 U.S. (19 How.) 393-633. Historians are interested in what the judges *said*, and not in the question whether, under the established practice of the Court, each spoke on a particular question *judicially*—so as make any opinion in which a majority concurred a true holding or decision, and so a precedent. In these pages technicalities of pleading and practice are ignored, and views expressed by a majority are called "decisions." The scholar and lawyer who argued before the Court the constitutionality of the Compromise act, later wrote: "If . . . a majority of the Judges of the Supreme Court can render a judgment ordering a case to be remanded to a Circuit Court, and there to be dismissed for a want of jurisdiction, which three of that majority [of 6] declare was apparent on a plea in abatement, and these three can yet go on . . . to decide a question"—that of the constitutionality of the Compromise—"involved in a subsequent plea to the merits, then this case is a judicial precedent against the validity of the Missouri Compromise"—George Ticknor Curtis, *The Just Supremacy of Congress over the Territories* (1859), 42 (App. A, 38-42: "Note on the Dred Scott Case"); italics added. After all, a majority of the Supreme Court thought it permissible under the Court's practice to do these things. Charles Warren deals with the case, in his *Supreme Court in United States History* (1926, 2: ch. 26), popularly; but, as a lawyer, says that "six of the judges . . . concurred in holding, not only that a negro could not be a citizen of the United States, but also that Congress had no power to exclude slavery from the Territories"—2: 300.

²⁰¹ Dred Scott resided at Fort Snelling, west of the Mississippi in what is now Minnesota. The Ordinance of 1787 (1789) was extended in 1836 to that portion of the Territory of Wisconsin which included the site of Fort Snelling. But since that place was not part of the Northwest Territory ceded by Virginia, the compacts between her and the Confederation (assumed

thus disposing of the substance of the case by these two distinct interpretations of the federal Constitution, the Court, by a majority of seven to two, pronounced consideration of substantive issues unnecessary by holding, in accord with *Strader v. Graham*, that Dred's status depended solely on state powers and state law; and since, by decision of the Supreme Court of Missouri rendered *before institution of the case in the federal courts*, Dred Scott was a slave, and therefore could not be a citizen of Missouri, there was no jurisdiction over the case in the federal courts as a controversy between citizens of different states.

An adequate discussion of the law of status and property involved in the case, of the legal points presented by it, and of the arguments of the judges upon them, is here quite impossible. Only the second of the Court's three decisions is here of direct interest. It was necessary first to ascertain the source of any power in Congress to govern the territories, and thereafter to define the limitations existing upon its exercise. The general right to govern acquired territory was qualified, as respected the territory ceded by Virginia and to a lesser extent as respected that purchased from France, by the compacts made as part of the price of acquisition. Only the latter, however, were necessarily involved at all in the case.

The essential problem was whether the acts of Congress within

by the new Union under the prior-engagements clause of the Constitution), even had they covered the abolition of slavery in the ceded territory, could not have given vitality to an extension of the Ordinance beyond the limits of the Virginia cession.

Under Chief Justice Taney's acquiescence-in-the-Ordinance theory of the compacts between Virginia and the Confederation (*ante lxxxvii seq.*), and the assumption of their obligations in the same way by the new Union, one must say that the sovereign which ceded the territory impliedly granted the power to abolish slavery. Under the writer's view of the compacts, although there was none that dealt explicitly with the abolition of slavery, the power to abolish it (or later re-establish it) was in the Confederation by virtue of the compact empowering it to govern the territory, with no limitation thereon stated, and was conferred upon the new Congress under the rules-and-regulations clause. References by the Court to the Ordinance were, however, necessarily dictum in any case, since Fort Snelling was outside the territory affected by the compact.

As respects territory outside Virginia's grant the Court denied in the Dred Scott case any power in the new Union, or at least in it when acting through Congress, to abolish slavery in the territories. The writer finds it present in Union and Congress as above. Justice Catron, dissenting from the majority on this point, took the same view as respected the power, but held its *exercise* barred by a condition supposedly set by France in her cession of Louisiana—60 U.S. at 524 *seq.*

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the territories are subject to constitutional restrictions under the first nine amendments that admittedly control it within the limits of the states.

We have seen that Chief Justice Taney contended that the rules-and-regulations clause power was restricted to territory owned when the Constitution was framed. Another view voiced in the opinions was that the rules and regulations authorized by it were not political regulations constituting government, but regulations of the territory as mere landed property. One of the justices sitting in *Dred Scott v. Sandford* adhered to both of these views;²⁰² Chief Justice Taney contended for the first, and leaned sympathetically toward the second as far as possible in limiting the content of the power, but did not adopt it;²⁰³ and Thomas Hart Benton, in his analysis of the Court's decision, accepted the second view but rejected the first. The reasons given by the Chief Justice have been considered, and his conclusion rejected; they were effectively answered by Justice Curtis in his dissenting opinion.²⁰⁴ Those given by Senator Benton are wholly unac-

²⁰² Justice Campbell, *ante* at notecall 150.

²⁰³ *Ante* *cv*, cxiii *seq*.

²⁰⁴ 60 U.S. at 604-14. His argument may be recapitulated as follows: Before the Constitution was framed, territory and jurisdiction thereover had already been ceded by four states; while its framers were in session the claims of South Carolina were ceded; and the great cessions later made by North Carolina and Georgia were confidently expected. The Ordinance of 1787, passed while the Constitution was in process of drafting, provided for the government of the territory northwest of the Ohio River. Of course it was known to the members of the Federal Convention; in fact, a draft of it in nearly final form was published in a Philadelphia newspaper. It must have been manifest to everybody that the Constitution must provide for the continuance thereunder of the government thus initiated in the Northwest Territory. Provision was made for the admission of new states. The provision was admittedly made to cover both the Northwest Territory and the lands whose cession by North Carolina and Georgia was imminent;—as well as Maine and Vermont. It seems perfectly clear “that the necessity for a competent grant of power to hold, dispose of, and govern territory, ceded and expected to be ceded, could not have escaped the attention of those who framed or adopted the Constitution; and that if it did not escape their attention, it could not fail to be adequately provided for”—60 U.S. at 608. Immediately following the provision for admission of new states, in the same section of the Constitution, came the grant to Congress of power to make “all needful rules and regulations respecting the territory or other property belonging to the United States.” How, under the circumstances, could that mean “now belonging”? There was a necessity that it should apply to the territory whose cession was imminent; there was no reason why it should not apply to *any* territory later acquired.

We know that its draftsman very specially meant it to apply to foreign territories later acquired, and before 1857 six states formed from such territory had been admitted to the Union, thus making impractical all discussion of the matter.

ceptable.²⁰⁵ The position taken by the Chief Justice was not indispensable to his decision on the issue of congressional power. It did, however, lessen the obstacles in the way of that decision. It made the rules-and-regulations clause, and its very broad language, wholly inapplicable to the territory acquired in 1803.

He argued also, as we have seen, that the language of the clause was not that in which general *legislative* powers would be conferred. But the answer of Justice Curtis (doubtless urged in conference) was

²⁰⁵ "The history of the times," according to him, "shows to be an error" the view that the rules-and-regulations clause authorized "political action of Congress over the Territories"—*Dred Scott Case*, 51. But the looseness, in places, of his reasoning and of his language greatly lessens the value of his arguments. The book was largely a compilation from the *Thirty Years' View*. So far as it involved original writing, as it did on the matters here involved, it was written under circumstances that excuse defects.

For two reasons much of what he wrote was confused. (1) He habitually wrote without proper distinction between the old Congress and the Confederation, the new Congress and the new Union: "The Congress of the Confederation made the engagement,"—that is, the compacts consummated by Virginia's cession—"and executed it in the ordinance of 1787; the Constitution devolved the engagement upon the new Congress, which executed it in the same way"—*ibid.* 35; that is, by re-enacting the Ordinance. And (2), he put the Ordinance on complete equality, as respects legal status, with the Constitution. For example, as follows: "The ordinance provided only for the government of the Territories—not for the disposal of the lands within them; and hence the propriety of the clause in the Constitution to authorize Congress to dispose of the territory, *i.e.* the land; and to make needful rules and regulations respecting it"—*ibid.* 37; italics added. And again he wrote of the rules-and-regulations clause: "Neither that clause, nor any other in the Constitution, applied to the government of the Territory, because that had been provided for in the ordinance; and the ordinance itself had been provided for in the assumption by the new Federal Government of all the engagements entered into by the old Continental Congress"—*ibid.* 37; italics added. (As in the first example, the distinction between Congress and Union is ignored; the engagements were not of the old Congress, but of the Confederation; the Ordinance was not an engagement, nor any of its provisions.) And this last might seem why he wrote, only two pages before, that "There was no authority in the Constitution to adopt it, yet Congress adopted it"—were this not immediately followed by statements that there *was* authority to adopt it, namely under the prior-engagements clause—*ibid.* 35. The true engagements were the three compacts just specified by him on p. 36; as Benton himself correctly stated more than once. "The engagement was—*first*, to dispose of the ceded land.—*secondly*, to build up political communities upon it. And the Constitution provided for the fulfilment of both branches of the engagement" (though he says twice above only for the first), "*and the adoption of the ordinance fulfilled the political part of the engagement,—building up political communities on the Territory; and the clause in the Constitution for disposing of the Territory, and other property of the United States, followed by acts of Congress to sell the public land, fulfilled the other*"—*ibid.* 50; italics added, and similarly 35. These last passages cited conceded that the Ordinance was only an act in performance of obligations assumed.

conclusive: "that this is a grant of power to the Congress—that it is therefore necessarily a grant of power to legislate—and, certainly, rules and regulations respecting a particular subject, made by the legislative power of a country, can be nothing but laws. Nor do the particular terms employed . . . tend in any degree to restrict this legislative power. Power granted to a Legislature to make all needful rules and regulations respecting the territory, is a power to pass all needful laws respecting it."²⁰⁶

Now, whatever might be the source of the power of Congress, the fact was perfectly clear that Congress, in legislating for different territories, had repeatedly assumed that it possessed power either to prohibit or not to prohibit slavery therein. It had sometimes "extended" the Ordinance of 1787 with its prohibitory article to new territories.²⁰⁷ It had sometimes extended it without that article.²⁰⁸

Thomas Hart Benton, in a book written to refute the Dred Scott decision on the unconstitutionality of the Missouri Compromise, elaborated some of the preceding instances and added others indicative of the opinion entertained on the question by Congress, as shown by legislative action from 1789 up to the Dred Scott decision. Ten years before the date at which the Constitution empowered Congress to prohibit the importation of slaves from foreign countries into the states (1808) it had prohibited their importation into Mississippi Territory.²⁰⁹ Six years later it wholly prohibited their importation into Orleans Territory from abroad; prohibited importation from the original states of slaves imported therein since 1798, unless introduced by an owner moving into the territory "for actual settlement"; and for violation of these provisions set the penalty of a fine and the

²⁰⁶ 60 U.S. at 614.

²⁰⁷ Justice Curtis enumerated notable instances—*ibid.* 618-19. Of this first class were the extensions to Indiana Territory (1800), Michigan Territory (1805), Illinois Territory (1809), the Territory of Wisconsin (1836), the Territory of Iowa (1838), and the Territory of Oregon (1846). The last three cases (the first of the three only to a slight extent) involved territory to which the Ordinance was, until the extension, wholly unrelated.

²⁰⁸ These were likewise enumerated by Justice Curtis—*ibid.* They were the cases of the Southwest Territory (1790), the Mississippi Territory (1798)—involving territory ceded by North Carolina and Georgia; Orleans Territory and District of Louisiana (1804), Orleans Territory (1805), Missouri Territory (1812)—involving portions of the Louisiana Purchase; and the Territory of Florida (1822)—involving the Spanish purchase.

²⁰⁹ Benton, *Dred Scott Case*, 47-48; sec. 7 of act of April 7, 1798—Carter, *Territorial Papers*, 5: 21.

emancipation of the slaves.²¹⁰ In 1806 a bill to prohibit the introduction of slaves, generally, into the Mississippi Territory and the Territory of Orleans was not reached for final action. But it was treated as ordinary legislation; no distinction was made between the territory long within the limits of the states and that acquired from France; and again the question of constitutionality did not appear.²¹¹ When, in 1819, it was moved in Congress to abolish slavery in Arkansas Territory—to prohibit the future introduction of slaves, and to emancipate at the age of twenty-five slave children born therein—Senator Benton states that “no one” challenged the proposal as unconstitutional. It was debated solely on grounds of expediency and with reference to the terms of the treaty with France; although two future justices of the Supreme Court (Philip P. Barbour and Henry Baldwin) were members of the House, in which one of the two provisions of the bill was lost by only one vote and the other by two votes (not theirs).²¹² In the same year, as respects the Missouri debate, no one, according to Benton, challenged the constitutional power of Congress to prohibit the further admission of slaves into territories west of the Mississippi. “Of the forty-two who voted against the Compromise, there was not one who stated a constitutional objection.”²¹³

We have earlier seen that when President Monroe in 1820 requested the written opinions of the members of his cabinet on the questions whether Congress could constitutionally prohibit slavery in a territory, and whether if it be “forever” prohibited that would bind

²¹⁰ Benton, *Dred Scott Case*, 61-65; sec. 10 of act of March 26, 1804, for the organization of Orleans Territory and the District of Louisiana—Carter, *Territorial Papers*, 9: 209. In this same act Congress authorized the territorial governor and judges of Indiana Territory to act as a legislature for the District of Louisiana—sec. 12. Benton says they were authorized “to administer the ordinances of '87 in that upper half of Louisiana”—*Dred Scott Case*, 68-69. This is true only in the sense that, since they were authorized to establish inferior courts and “to make all laws which they may deem conducive to the good government of the inhabitants,” conceivably, they *might* have enacted a law prohibiting slavery. In fact proslavery sentiment was there very strong; many slaveholders had migrated there from the Illinois Country—F. S. Philbrick, *The Laws of Indiana Territory, 1801-1809* (*I.H.C.* 21) xx-xxi, xxxv and n. 4, liv, lxxv, cxxxiii-cxxxiv, cexviii and n. 1, cxxxi. There was a movement to join the western part of Indiana with the District of Louisiana, in which move the large slaveholders of the former were prominent—see Carter, *Territorial Papers*, 7: index, s. v. “Louisiana, Upper” and “Louisiana District.” In fact, as Mr. Carter says, one law passed by the Indiana officials was a slave code.

²¹¹ Benton, *Dred Scott Case*, 48-49.

²¹² *Ibid.* 79-84.

²¹³ *Ibid.* 89-95.

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a state therefrom created, they unanimously answered the first question in the affirmative (Calhoun being one of them); and the second question (Secretary Adams dissenting) in the negative.²¹⁴

In 1845, when Texas was admitted and sanction given for the creation therefrom of additional states, it was provided that slavery should not exist in any such state north of the Missouri Compromise line;—that is, that line was recognized and given further extension westward.²¹⁵

In the great debates of 1848—first over the organization of Oregon, and then over a proposed conglomerate disposal of all the territory ceded by Mexico—new developments appeared.²¹⁶ Reverdy Johnson, a great lawyer, added his opinion that Congress could constitutionally bar slavery in the territories.²¹⁷ The compact articles of the Ordinance of 1787 were extended in 1848 to Oregon.²¹⁸ Calhoun, despite his vote when secretary of war in Monroe's cabinet, now for the first time denied the power of Congress. In 1847 he had given voice to the theory that because the Constitution recognized property in slaves, any slaveholder could under its protection take slaves into a territory *as representative of his state*, the equality of which with northern states would otherwise be denied.²¹⁹ In 1848 he again voiced the doctrine of the *self-extension* of the Constitution over the territories,—though at the same time the proslavery party were endeavoring to effect such extension by statute²²⁰—and added (though of this he was not the original author) the proposal to submit to the Supreme Court of the United States, by allowing appeals thereto from territorial courts, the issue of constitutional power.²²¹ Finally, in the compromise bill fathered by Clay in 1850 provision was made for the extension of the "Missouri Compromise Line" to the Pacific Ocean. It did not pass, but many leading southern senators voted for it, and

²¹⁴ *Ibid.* 96-100. Madison, writing in 1819, was of the same, undoubtedly correct, opinion that any power over slavery was "obviously limited to a Territory whilst remaining in that character as distinct from that of a State"—letter of Nov. 27 to R. Walsh, *Writings* (Hunt ed.) 9: 6.

²¹⁵ *Ibid.* 101-2.

²¹⁶ *Ibid.* 106-8, 113-20.

²¹⁷ *Ibid.* 108.

²¹⁸ *Ante* n. 207—sec. 14 of act of Aug. 14, 1848, *U. S. Stat. at Large*, 9: 329.

²¹⁹ Benton, *Dred Scott Case*, 18 n. See Benton's exposure of Calhoun's inconsistencies—*Dred Scott Case*, 97-100, 114-20.

²²⁰ *Ibid.* 12-23, 29, 118-20, 131-39.

²²¹ *Ibid.* 26 n.

some very able southern lawyers such as Senator Berrien did not challenge it on constitutional grounds.²²²

As respects the power of Congress to regulate or exclude slavery (and so as respects the contention that this power was limited by constitutional restrictions on its powers within the states that allegedly applied equally to the territories), there can be no doubt whatever that the Court's decision in *Dred Scott v. Sandford* was, as Benton concluded, in conflict "with the uniform action of all the departments of the Federal Government from its foundation" to the time when he wrote. It abrogated "the Missouri Compromise (which saved the Union)" and abrogated "squatter sovereignty (which killed the compromise)"; and did this by a decision of six to three on grounds which one of the six wholly ignored, one wholly repudiated, and others of the six qualified.²²³ Still, it must be admitted that recognition of the theories it repudiated, though consistent and continuous as respected the executive and legislative departments, rested—so far as the judiciary was concerned—on decisions of inferior courts, with no more than dicta or doubtful decisions in the Supreme Court.²²⁴ That Court had opportunity for the first time in the *Dred Scott* case to decide directly upon the powers of Congress. All three of the issues which it decided were, legally speaking, properly before it and, legally speaking, there was no impropriety in deciding them; indeed, as the Chief Justice said, it was the duty of the Court to decide them.

Nevertheless the questions involved in the first two decisions were essentially political, and in fair discretion the Court could have avoided their utterance; the first by not resorting to excessively narrow pleading, and the second either by following *Strader v. Graham*, as already said,²²⁵ or by merely acquiescing in the long-continued attitude of the other departments of the government. The Court did not elect to follow the way that discretion would have dictated. Possibly because a tribunal predominantly of southern members felt itself to be a protector of southern interests where the law was unclear, it elected to erect a legal bar to popular decision of the political issues

²²² *Ibid.* 111-13.

²²³ *Ibid.* 121, 123, 124-25.

²²⁴ Including circuit courts of the United States. Compare remarks of Justice Catron in 60 U.S. at 519-23; and the antagonistic interpretations of *Amer. Insur. Co. v. Canter* (1828), 26 U.S. (1 Pet.) 511 by Chief Justice Taney in 60 U.S. at 442-46 and Justice Curtis, *ibid.* at 613.

²²⁵ *Ante* cxxx-xxxi.

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involved. In order better to understand the divergent opinions of its motives entertained by its defenders and detractors, it is desirable to note the manner in which it proceeded. It made certain choices in framing the case for discussion, and the arguments by which its conclusions were supported depended in large degree on these choices. This will be here pointed out only as respects the decision on the Missouri Compromise.

The general nature of the restriction to which, in Taney's judgment, congressional power in the territories was subject was made abundantly clear in his opinion. Government of a territory *existed* "to protect the citizens of the United States who should migrate to the territory, in their rights of person and of property." If, said he, the regulations clause were construed to give Congress "a despotic and unlimited power over persons and property, such as the confederated States might exercise in their common property, it would be difficult to account for the phraseology used, when compared with other grants of power."²²⁶ However, we have seen that they were in fact, in various instances, obviously identical.

But all this was vague. It was essential to point to constitutional provisions which constituted a concrete basis for the contention that the restraints just indicated actually existed. Up to this point, then, what was the situation? It was admirably stated by Senator Benton:

There being [by the holding of the Court] no power in Congress, or the Territorial Legislature to legislate upon slavery, the whole subject is left to the Constitution and the State law! that law which cannot cross the State line! and that Constitution which gives protection to slave property but in one instance, and that only in States, not in Territories—the single instance of recovering runaways. The Constitution protect slave property in a Territory! when by that instrument a runaway from a Territory or into the Territory, cannot be reclaimed. Beautiful Constitutional protection that! only one clause under it to protect slave property, and that limited, in express words, to fugitives between State and State! and but one clause in it to protect the master against his slaves, and that limited to States! And but one clause in it to tax slaves as property, and that limited to States! and but one clause in it to give a qualified representation to Congress, and that limited to States.²²⁷

Assume, then, that one desired to challenge the constitutional

²²⁶ 60 U.S. at 435, 439.

²²⁷ Benton, *Dred Scott Case*, 19-20.

power of Congress to act as it had so long acted, with the general acquiescence of the executive and of the federal judiciary save the Supreme Court. Could the challenge be aided by assuming the action of Congress to have been taken under one source of constitutional power rather than under another? The answer is that as a matter of strategy a great deal depended on the source selected. Having led the Court to hold that the rules-and-regulations clause did not apply, and having thus escaped the dangers of its loose phraseology, it was necessary for Taney to derive the power to govern territories from some one of the Constitution's provisions which conferred powers to acquire and hold territory. For good reasons there were no such explicit provisions,²²⁸ but more than one in which the grant of power to do those things was implicit. To have chosen the vague and emergency powers to make war and peace, for support in an argument to *restrict* the powers of the federal government, would obviously have been unwise. The Chief Justice chose the power to admit new states.

He began with a misleading appeal to Madison, who had attacked *implied* powers, as having warned against dangers inherent in congressional government of the territories;²²⁹ this, of course, by way of

²²⁸ *Ante* xcv seq.

²²⁹ He referred to Madison's discussion in *The Federalist* (No. 38) of the acquisition of territory by the old Congress, referring to it as a usurpation of power: although it has been shown above that on either one of two theories, one of them Chief Justice Taney's, it was not—*ante* lxxxiv-xc. He misrepresented Madison's position in two ways. "He speaks," said the Chief Justice, "of the acquisition of the Northwestern Territory . . . and the establishment of a Government there, as an exercise of power not warranted by the Articles of Confederation, and dangerous to the liberties of the people. And he urges the adoption of the Constitution as a security and safeguard against *such* an exercise of power"—60 U.S. at 447. It was not the acquisition of the territory, nor was it the establishment of government therein, that he pronounced dangerous; it was the necessity of resorting to implied powers to accomplish these indispensable ends, that Madison attacked as dangerous: *not* the power, nor the exercise of the power, but such a mode of acquiring the power. The reference to Madison is understandable only if one interprets Madison's remarks to mean that *territorial government* is "dangerous to the liberties of the people"—therefore the power to govern should be reduced: as Taney was endeavoring to reduce them—first by eliminating the "all needful rules-and-regulations" clause, secondly by imposing on the new-states clause constitutional restrictions protective of personal and property rights. On the other hand, to a reader who correctly understands Madison's remarks as applying only to the *danger of resorting to implied powers* in a case so vital as the establishment of territorial governments, Taney's reference to those remarks must seem extremely careless. For taking what Madison said in No. 38 in conjunction with what he said in No. 43, it is clear that Madison found an express power in the Constitution—namely, the rules-and-regulations clause. See *ante* lxxxiv-v and nn. 91, 92. Taney must have

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justification for narrowing *governmental* power as far as possible. He then proceeded as follows (constantly reiterating, it will be noted, the general restriction which he assumed to exist) :

We do not mean, however, to question the power of Congress in this respect. The power to expand the territory of the United States by the admission of new States is plainly given . . . ²³⁰ It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority . . . whatever the political department of the Government shall recognise as within the limits of the United States, the judicial department is also bound to recognise, and to administer in it the laws of the United States, so far as they apply, and to maintain in the Territory the authority and rights of the Government, and also the personal rights and rights of property of individual citizens, as secured by the Constitution. *All we mean to say on this point is*, that, as there is no express regulation in the Constitution defining the power which the General Government may exercise over the person or property of a citizen in a Territory thus acquired, the Court must necessarily look to the provisions and principles of the Constitution and its distribution of powers, for the rules and principles by which its decision must be governed.

Taking this rule to guide us, it may be safely assumed that *citizens of the United States who migrate to a Territory . . . cannot be ruled as mere colonists, dependent upon the will of the General Government, and to be governed by any laws it may think proper to impose . . .* Whatever [territory] it acquires, it acquires for the benefit of the people of the several States who created it. It is their trustee acting for them, and charged with the duty of promoting the interests of the whole people of the Union in the exercise of the powers specifically granted . . .

But the power of Congress over the person or property of a citizen can never be a mere discretionary power . . . *The Powers of the Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself . . . The Territory being a part of the United States, the Government and the citizen both enter it under the authority of the Constitution, with their respective rights defined and marked out; and the Federal Government can exercise no power over his person or property, beyond what that instrument confers, nor lawfully deny any right which it has reserved . . .*

It seems, however, to be supposed, that there is a difference between property in a slave and other property . . . the right of property

been familiar with No. 43. It is impossible to see in his argument anything better than perverse special pleading.

²³⁰ Though the best for his immediate purposes, this source of power to acquire territory has undoubtedly less judicial (*and logical*) support than any other. See *ante* n. 117.

in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it . . . was guarantied . . . for twenty years. And the government . . . is pledged to protect it in all future time, if the slave escapes from his owner. . . .

Upon these considerations, it is the opinion of the Court that the act of Congress which prohibited a citizen from holding and owning property of this kind . . . north of the line therein mentioned, is . . . void.²³¹

The advantage, strategically, of deriving congressional power over territories from the power to admit new states is thus made very apparent. It enabled Chief Justice Taney to voice the doctrine that the Constitution "extends" automatically over the territories; that is, specifically, as respects the restrictions on the power of Congress imposed by the Bill of Rights—which alone were involved in the case. (As for the rest of the Constitution, those who denied its *automatic* extension agreed that Congress could, by legislation, extend all of it to the territories, so far as pertinent to them, and had "extended" much of it.) It seems safe to assume that the great majority of citizens in the 1850's, had the problem of slavery as argued by Calhoun not obtruded, would have desired (as the great majority today, if prejudices against distant dependencies of "foreign" population could be eliminated, would desire) that whatever constitutional restrictions bind congressional power within the states should bind it in ruling territories or dependencies. Yet antislavery citizens were nonplussed by the Calhoun argument—which the Court made the basis of its decision, as shown above, in the Dred Scott decision—that because other parts of the Constitution also "extended to" the territories, slavery was there protected. Undoubtedly the draftsman of the rules-and-regulations clause did not intend to give to Congress a power in any manner qualified; and the acceptance of phraseology satisfactory *to him*, both in that clause and the new-states clause, was due to three causes. One, that a political reactionary who was among the most active and forceful speakers of the Convention happened also to have

²³¹ 60 U. S. at 447-48, 449-50; italics added. Compare the last paragraph (particularly) with Calhoun's resolutions of Feb. 1847 printed by Benton in his *Dred Scott Case*, 18 n. After joining in decisions denying compact character even to the Ordinance's "compact" articles (*post* cxxvi *seq.*), Taney made *all* its provisions compacts in his Dred Scott opinion (*ante* lxxxvii *seq.*, cxx-xxii), but that involved territory outside Virginia's cession. His proposition regarding fugitive slaves, above quoted, was therefore based on a theory that the Constitution required positive legislation by Congress protecting such property—a duty virtually ignored by it until 1850. See *post* clix *seq.*

a gift of style in writing; another, that opinions on these territorial problems were so strong and far apart that compromise was unavoidable; and a third—that undoubtedly a majority of the members were fearful of foreign intrigue and domestic disorder in any western territories that might be organized.²³²

Whether constitutional restraints did operate on legislation for the territories was a question that did not arise in earlier years because the Ordinance's supposedly compact articles proclaimed for the benefit of the Northwest's inhabitants all the traditional Anglo-Saxon liberties of person and rights of property unqualifiedly except as to property in slaves (both Calhoun and Taney conceding that exception to be good), and there had never been any attempt to violate them. But, as respected other territories, the extent of congressional power had been a moot problem for nearly a decade before the decision in the *Dred Scott* case. Webster's position on this question was not wholly clear. He did clearly deny that those personal liberties which

²³² *Post* cclxxxiii seq. and ccxxix seq. It has already been seen that the Constitution gives Congress, in the rules-and-regulations clause a power in content unqualified. The territories seem, under that, to be entities collateral and subsidiary to the federal system (see *post* ccxxiv-v) governed with complete discretion by Congress. "The preamble"—of the Constitution—"shows it was made by States, and for States. Territories are not alluded to in it. The body of the instrument shows the same thing, every clause, except one, being for States; and Territories, as political entities, never mentioned once; and the word "territory," occurring but once, and that as property. . . . Tried by the practice under it, and the Territory is a subject, without a political right . . . no political rights under it, except as specially granted by Congress: no benefit from any act of Congress, except [when] specially named in it. . . . Far from embracing these Territories, the Constitution ignores them, and even refuses to recognize their existence where it would seem to be necessary—as in the case of fugitives from service, and from labor. Look at the clause. It only applies to States—fugitives from State to State. Why? because the ordinance of '87, the organic law of the Territories, made that provision for the Territories"—T. H. Benton, *Dred Scott Case*, 27. "Not a clause in the Constitution which relates to slaves, extends to Territories—neither the fugitive slave clause, nor the protection against domestic violence, nor the acknowledgment of property implied in taxation: and if the Constitution was extended to Territories, (which it cannot be,) not a claim could set up *under* it for protection to slave property! Not a law could be made *under* it for the protection of that property. The Constitution does not even grant protection to a Territory against invasion! nor does it guarantee them a republican form of government! and that is the reason that they have never been governed on republican principles"—*ibid.* 28-29. The re-enacted Ordinance of 1789 "was made after the Constitution, but not under it, for it is a clean and naked piece of abnegation and contradiction of the Constitution from beginning to end"—*ibid.* 35.

See *post* ccxcv. Congress, having unlimited power, was alone responsible after 1789 for unrepresentative government in territorial government.

Congress was forbidden by the Constitution's Bill of Rights to violate within the limits of the united states (assuming them to exist there) were, by force of that prohibition, *given* to the inhabitants of any territory. They must, he said, be conferred on such inhabitants by congressional legislation. At the same time he disclaimed any assertion that Congress, while legislating for the territories, was "not bound by every one" of the "principles" enunciated in the Bill of Rights.²³³ What did this mean?—that Congress was legally bound to confer the rights and then not violate them? If it meant only that there was a moral obligation to confer them, legislation in disregard of the principles, after failure to confer such rights, would be perfectly valid. Thomas Hart Benton made no acknowledgment of an obligation to confer the rights or respect the principles. It seems clear that if one part of the Constitution actually restrained congressional action on the territories every other part that could possibly be pertinent would equally bind Congress. But both Benton and Webster showed clearly that aside from these personal liberties involved in the Bill of Rights—and which were *granted* to the inhabitants of the Northwest Territory by the old Congress in 1787 and re-granted by the new Congress in 1789—the latter body legislated from the beginning as having absolute power. It was for this reason that Benton, in his criticism of the Dred Scott decision, characterized its approval of the Calhoun doctrine of the Constitution's "extension"

²³³ "Let me say, that in this general sense there is no such thing as extending the Constitution. The Constitution is extended over the United States [federated states], and over nothing else. It cannot be extended over anything, except over the old States and the new States that shall come in hereafter, when they do come in. There is a want of accuracy of ideas in this respect that is quite remarkable. . . . It seems to be taken for granted that the right of trial by jury, the *habeas corpus*, and every principle designed to protect personal liberty, is extended by force of the Constitution itself over every new Territory. That proposition cannot be maintained at all. How do you arrive at it by any reasoning or deduction? It can only be arrived at by the loosest of all possible constructions. It is said that this must be so, else the right of *habeas corpus* would be lost. Undoubtedly, these rights must be conferred by law before they can be enjoyed in a Territory. . . . I do not say that while we sit here to make laws for these Territories, we are not bound by every one of those great principles which are intended as general securities for public liberty. But they do not exist in Territories till introduced by the authority of Congress. These principles do not, *proprio vigore*, apply to any one of the Territories of the United States, because that Territory, while a Territory, does not become a part of the United States"—March 3, 1849, *Congressional Globe*, 30 Cong. 2 Sess. App. 273 (col. 1); a portion is quoted (inaccurately) by Benton, *Dred Scott Case*, 14 n. See also the quotation in *Thirty Years' View*, 2 (1856): 730-31.

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over the territories as "a fundamental mistake, which pervades [the Court's] entire opinion, and is the parent of its portentous errors," "the great fundamental error of the Court, (father to all the political errors,)" in its opinion.²³⁴

Although the problem is now of less manifest gravity than during the long period when millions of our citizens lived under territorial governments in the West, it is perhaps of no less moment today as a matter of national policy in connection with our overseas dependencies. Since the Spanish-American War the Supreme Court has been compelled to deal with it in a number of cases, and the tentative result is to uphold Webster's fundamental position that the Constitution's guaranties of personal rights and liberties do not automatically "extend" beyond the federal system; that they exist outside that only at the option of Congress. There is perhaps not yet settled agreement as to the test by which to ascertain whether and how Congress has manifested its will on that point.²³⁵

Taney proceeded to assume that various provisions of the first eight amendments restrictive or prohibitive of congressional power within territory of the united states applied equally to congressional power within the territories.²³⁶ Justice Curtis did not challenge him on this point; it was not necessary to do so. Indeed, he did not even emphasize the fact that the Chief Justice could cite no authorities; he even concurred in a general way that the restrictions mentioned did in fact exist.²³⁷

In this way the Chief Justice had, under his views, removed from his path the rules-and-regulations clause by holding it to be limited to the Old Northwest. He had next substituted for it, as respects all

²³⁴ *Dred Scott Case*, 11, 26, 35-36; ante cxxxv-vi.

²³⁵ See discussion, and cases cited in W. W. Willoughby, *Constitutional Law* (2d ed.), sec. 268; particularly, *Hawaii v. Mankichi* (1903), 190 U.S. 197; *Dorr v. United States* (1904), 195 U.S. 138; *Rasmussen v. United States* (1905), 197 U.S. 516. No doubt, looking backward and applying the test of "incorporation," it would be found that the constitutional guaranties were "extended" by Congress to the *Old Northwest*—by their explicit grant in the compact articles; and so of many other territories. But that does not mean that Calhoun's (Taney's) *general* principles were sound; they were both constitutionally unsound and inconsistent with sound principles of property law.

²³⁶ 60 U.S. at 435, 450. The instances he gave were all from the Bill of Rights. Other restrictions of great importance are in Art. I, secs. 8 and 9. See a discussion of these by C. C. Langdell, "The Status of Our New Territories" (1899), *Harvard Law Review*. 12: 365, at 379-86.

²³⁷ 60 U.S. at 623.

territory acquired in 1803 and later, an implied power to govern, deriving this from the source best suited to his purpose of restricting the powers of Congress. Yet no express restriction had yet been cited. He completed his argument as follows:

The powers of the Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself. And when the Territory becomes a part of the United States, the Federal Government enters into possession. . . . with its powers strictly defined, and limited by the Constitution, from which it derives its own existence it has no power of any kind beyond it; and it cannot, when it enters a Territory of the United States create for itself a new character separated from the citizens of the United States, and the duties it owes them under the provisions of the Constitution. The Territory being a part of the United States, the Government and the citizen both enter it under the authority of the Constitution, with their respective rights defined and marked out; and the Federal Government can exercise no power over his person or property, beyond what that instrument confers, nor lawfully deny any right which it has reserved

For example, no one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble, and to petition the Government for the redress of grievances

These powers, and others, in relation to rights of person, . . . are, in express and positive terms denied to the General Government; and the rights of private property have been guarded with equal care. Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress *which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of due process of law*

The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined [that is, explicitly] to the States, but the words are general, and extend to the whole territory . . . under Territorial Government, as well as that covered by the States

It seems, however, to be supposed, that there is a difference between property in a slave and other property [But] if the Con-

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stitution recognises the right of property of a master in a slave, and makes no distinct between that description of property and other property . . . no tribunal . . . has a right . . . to . . . deny it the benefit of the . . . guarantees . . . provided for the protection of private property against the encroachments of the Government.²³⁸

With these final efforts the Chief Justice, speaking for the Court, held that slavery in the territories was beyond the power of Congress to affect and that the Missouri Compromise was therefore void.²³⁹ Let us recall the general course of his argument. He had contended that the rules-and-regulations clause conferred no powers of political nature at all, but merely one to regulate the ceded territory as land; that if it conferred any political power the terminology did not admit of construing it as one of general legislative power; that in any case that clause was confined to lands already ceded in 1787 *and* (inconsistently) the unceded old Southwest; that the true source of Congress' legislative power was its power to admit new states; that this end controlled the means (of prior government), and necessarily excluded all "arbitrary" or capricious government; that hence Congress had either no powers over the personal status and property of

²³⁸ 60 U.S. at 449-51. Benton seemingly believed that arguments supporting "the supposed unconstitutionality of any regulation which would prevent a master from taking his slaves with him to a Territory" were refuted by the fact that the master himself might be excluded, or ejected after entry—*Dred Scott Case*, at 128. All the earliest settlers in the Northwest Territory were unlawful intruders upon public lands; countless squatters were later, there and in other territories, the same. It is true that the army many times ejected such intruders and destroyed their crops; though the battle against squatters was ultimately lost and the pre-emption acts passed. Benton cites an extraordinary instance when a strip of Arkansas Territory was cut off and given to the Cherokees, and its inhabitants driven away with their herds and slaves. But all this is beside the point. The question was: when a master could not be excluded (under statutes or the police power) must his slaves be admitted with him?

²³⁹ Justice Catron deserted the majority in their holding that the rules-and-regulations clause was not the source of Congress' power to govern the territories—60 U.S. at 519-20; but nevertheless held the Missouri Compromise act void because it conflicted with a supposed guaranty of slavery in Art. 3 of the treaty by which the Louisiana Purchase was effected—*ibid.* at 524-28. There was no merit in this contention; see *post* cccxvii at notecall 110 and the opinions of Justices McLean and Curtis—60 U.S. at 557, 630-33.

As regards the rules-and-regulations clause Justice Catron said: "It is asking much of a judge, who has for nearly twenty years been exercising jurisdiction, from the western Missouri line to the Rocky Mountains, and on this understanding of the Constitution, inflicting the extreme penalty of death for crimes committed where the direct legislation of Congress was the only rule, to agree that he had been all the while acting in mistake, and as an usurper"—*ibid.* at 522-23.

territorial inhabitants (except to protect them) or that its powers in the territories were at least in some way controlled—possibly only by traditional ideals—by the restrictions placed in the first eight amendments upon congressional legislation operative within the states, and particularly by the due process provision of the Fifth Amendment. The confusion underlying the assumption that the territories were “part of the United States” has already been pointed out.²⁴⁰ The arguments of Webster were ignored save for the presumption that nobody would contend what, in fact, he did contend.

What was the force of this reference to the “due process” provision? Of the various constitutional provisions alluded to by Taney as supposedly restrictive of congressional powers in the territories this was the only one that could possibly have applied to the actual case before him. Yet he did not declare that the Missouri Compromise *violated* the Fifth Amendment; he cited no authorities—made no argument. The vague, merely allusive, and plainly qualified character of his reference seems sufficient to show that he was appealing merely to the general spirit underlying the Amendment. Had the Chief Justice really rested his case on a violation of the due process clause, it would unquestionably have been demolished by the counterarguments of Justice Curtis.²⁴¹

The latter’s opinion was equally destructive of the Chief Justice’s other arguments. It has already been seen that he successfully refuted the claim that the rules-and-regulations clause related solely to the Northwest Territory.²⁴² Starting, then, with the fact that Congress was empowered to pass “all needful” enactments for the territories, it was those who *denied* the powers of Congress over slaves who asked for an exceptional treatment of that type of property; that is, the Chief Justice and his supporters—not, as he said, the anti-slavery dissenting justices.²⁴³ It was the Chief Justice who was compelled to claim, as respected the rules-and-regulations clause, that “though it says all, without qualification, it means all except such as allow or prohibit slavery.”²⁴⁴ And, said Justice Curtis, where the Constitution said “all,” there must be “something more than theo-

²⁴⁰ *Ante* n. 233. See *ante* n. 1; *post* ccxxiii-xv, cclxxxix, and nn.

²⁴¹ 60 U.S. at 626-27.

²⁴² *Ibid.* 605-14.

²⁴³ *Ibid.* 451 and 620.

²⁴⁴ 60 U.S. at 615, per Justice Curtis.

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retical reasoning'' to induce him to accept any narrower meaning.²⁴⁵ For his part, he had more than mere surmises on which to depend. The First Congress, containing twenty-two members who had sat in the Federal Convention, had in 1789 re-enacted the Ordinance of 1787, with its prohibition of slavery in the Northwest Territory, "in order that . . . [it] may continue to have full effect."²⁴⁶ Over a period of more than half a century Congress, as already noted, had assumed in passing thirteen statutes that it had power either to prohibit or to permit slavery in the territories.

In all that Taney said of restrictions upon congressional power over property he seems, in effect, to have been attempting to give a legal basis, without having much confidence in the argument, to Calhoun's dictum that property in slaves was "recognized" by the Constitution, and was therefore above and beyond any legislation by Congress. He had no authorities.²⁴⁷

Of course the Constitution did "recognize" slave property in allowing continuance of the slave trade for twenty years, and in providing for the return of fugitive slaves. But in the doctrines of Calhoun and Chief Justice Taney, there was attributed to the "property" thus recognized an absolute and universal character not required by the Constitution, nor consistent with its other provisions, nor adhered to in later constitutional construction. The recognition, in truth, was only one of property where made such by local law.

The situation as to fugitive slaves was simplest. A state provides

²⁴⁵ *Ibid.* at 621.

²⁴⁶ *Ibid.* at 617.

²⁴⁷ The doctrine of vested property rights beyond the power of a *state* unduly to impair had been involved before 1857 in a considerable body of state decisions; and in some states the basis of such decisions was the due process clause of their constitutions. Professor E. S. Corwin has expounded at length the history of this doctrine. Presumably because of a feeling that a court *should* have definite legal authority for its pronouncements, he has ascribed to Chief Justice Taney an attempt to engraft this principle as a restriction on the power of the federal government. See his *Doctrine of Judicial Review* (1914), at 148-52, his article on "The Dred Scott Decision in the Light of Contemporary Legal Doctrines" (1911), in *Amer. Hist. Rev.* 17: 52, at 61-67, and two articles on "The Doctrines of Due Process of Law before the Civil War" (1911) in the *Harvard Law Rev.* 24: 366-85, 460-79. If in fact such was Taney's attempt, Mr. Corwin showed that he had only one state decision to support him, as against decisions in a dozen other states—and no authorities on the issue of federal power. I believe that it is fairer to the Chief Justice to assume that he relied merely on the theory of indefinite constraint by the spirit of "the Constitution," when assumed to extend to the territories and control congressional legislation therein.

remedies by which the owner of a chattel may enforce his rights there-to or therein against third persons, in recovering it or in protecting his possession and enjoyment. If the state does not recognize a given thing as capable of being property there are no such remedies. The fugitive-slave provision positively required co-operation by free states in the recovery of fugitives. Possibly this requirement, in itself, did not override state sovereignty; it was consistent with later doubts as to whether a state could alter rights in things which—whether in or not in interstate commerce—were only transiently within its borders. Under that doctrine a state could not rightfully refuse to recognize a *fugitive* slave as property—though a Supreme Court inimical to slavery would certainly, while that existed, have followed the doctrine of immediate emancipation by entry upon the soil.²⁴⁸ There would seem to have been a great encroachment upon state sovereignty as respected even the time and mode of giving the aid required by the statutes of 1793 and 1850, for the Supreme Court in construing the latter act subordinated a free state's police power, and seemingly even its criminal law, to the policy of making effective the constitutional provision for the return of fugitives.²⁴⁹

Upon this basis of a mere recognition of slave property in the *fugitive-slave* clause Calhoun originated the doctrine, to which Taney gave constitutional status, relating to the introduction of slaves *by their masters* into federal territories.

Consider first the situation as respected the states. But for the presence in the Constitution of the privileges-and-immunities clause (Article IV, Section 2) each state could freely deny or permit the introduction of movable property of any nature. Slaves were not the only type of such property "recognized" by the Constitution. Though

²⁴⁸ For the present view of transitory presence, not in interstate commerce, see *Minnesota v. Blasius* (1933), 290 U.S. 1. On the general power of a state over chattel titles see note on "The Power of a State to Affect Title in Chattels Atypically Removed to It" (1948), *Columbia Law Review*, 48: 76-86. And compare, as regards the attitude of state courts toward instantaneous emancipation, *post* n. 250. For a critical review of English decisions, including the *Somerset* case, see J. C. Hurd, *The Law of Freedom and Bondage in the United States* (2 vol. 1858-1862), 1: secs. 180-91.

²⁴⁹ Compare remarks in *Prigg v. Pennsylvania* (1842), 41 U.S. 539, at 645 (Justice Wayne on the basic intent of the provision); 613, 625 (Story, J.), 626 (Taney, Ch. J.), 634 (Thompson, J.), 668 (McLean, J.) on police power and criminal law; 643, 627-33, 652 on total exclusion of state legislation even in aid of the federal statute. On the *Prigg* case see Hurd, *op. cit.* 2: secs. 728, 804-6.

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it does not mention cattle, household goods, or any other of the myriad forms of personal property, the application of various of its provisions—among them the privileges-and-immunities clause—involves the recognition of all of them. But there is nothing absolute in the “property” thus recognized. Almost all movables are recognized as property in all our states, but only with infinite variations in detail as respects the legal content that defines the precise nature of such “property”; that is, as respects the rights conceded to and the duties imposed upon the owners by local law, and as respects the legal remedies available for the protection of the rights and for enforcement of the duties. The definition of all types of property, save alone those (such as patent rights) that are created by Congress under grant of specific power in the Constitution, is left to the states. These few types aside, the things the Constitution “recognizes” as property are those that are property in the several states, and with the legal meaning there given to title. An independent country may absolutely exclude particular types of property recognized by it as such, or may refuse to recognize the legal existence of property of particular types. The few types of federal property again aside, the Constitution forced upon no state recognition of any specific type of property except *fugitive* slaves. And while, as already said, that provision was possibly not necessary to prevent immediate emancipation of the fugitive, the provision was inserted because free states existed, and perhaps because emancipation was feared, either instantaneous or consequential.²⁵⁰

²⁵⁰ See Clay's remarks on statutes of Louisiana and Mississippi forbidding the entry of slaves unless brought by their masters with intent of there residing, and on the emancipation of any introduced in violation of those statutes—*Cong. Globe*, 31 Cong. 1 Sess. App. 1410 (col. 2); Madison (1788) on immediate emancipation by entry into a free state—Farrand, *Federal Convention*, 3: 325. See also G. M. Stroud, *A Sketch of the Laws Relating to Slavery in the Several States of the United States of America* (2d ed. 1856), on laws in slaveholding states restricting introduction of slaves, 87-92; also, on recognition of instantaneous emancipation, 208-12. It was at one time possible to contend that such statutes violated the exclusive jurisdiction of Congress over interstate commerce, as Clay and Webster argued in *Groves v. Slaughter* (1841), 40 U.S. 449, 488, 494. The decision evaded that issue, but the argument was decisively repudiated in dicta—see 507-10. It was also long a mooted question whether such statutes violated the privileges-and-immunities clause; see Hild, *Freedom and Bondage*, 2: secs. 664-82. The law of fugitive slaves in all details is considered by him in secs. 711-960. The danger of emancipation through escape into free states is obvious. Endless difficulties had been encountered ever since the Constitution had gone into effect in obtaining what southerners regarded as adequate

What, then, of the territories? Respecting slavery therein the Constitution made provision for fugitive slaves only. By implication, *it* did not in any way otherwise regulate the institution. With that assumption the antislavery minority in the Dred Scott decision combined a broad construction of the rules-and-regulations clause to support the view that Congress had unquestionable power to enact the compromise of the Missouri Act. On the other hand the majority rested on the views of Calhoun: first, his life-long opinion that the rules-and-regulations clause conferred no governmental powers; second, his theory (first enunciated in 1850) that all the Constitution automatically and instantaneously extended to any territory when acquired, with the consequence that its "recognition" of slave property *carried* slavery into every territory, and made unconstitutional any law of Congress purporting to exclude it.

Of this doctrine various criticisms—in addition to the all important one, already adverted to, that it is not supported by subsequent decisions of the Supreme Court—may now be offered.

The first is that there was no legal basis for the claim of Calhoun and Taney that to permit exclusion of slavery from a territory was unjustly to "deprive" a slaveholder of property. If an owner of personal property removes it into another state his rights in relation thereto are often lessened or weakened, or his duties increased, but such a deprivation is never regarded as an injustice. A country (or one of our states) which does not recognize some specific type of property does not "deprive" of property an immigrant who vainly demands recognition of such a right. Calhoun and Taney, of course, made no denial of this as respected the exclusion of slavery from a state; and if exclusion from a territory by congressional legislation was otherwise constitutional there would evidently be no discrimination against immigrant *citizens* of slave states under the privileges-and-immunities clause. Both Calhoun and Taney seem to have admitted this—to themselves; for both of them evaded the point by arguing that the denial of right was to the slaveowner's *state*; that to admit property of a kind other than slaves brought by a northerner into a territory, and exclude slaves sought to be brought into it by

aid from free states in effecting the return of fugitive slaves. This situation was seemingly not greatly changed by the enactment of the first fugitive slave act, of 1793; see 41 U.S. 645. Of course, if recaption was not prompt the danger of actual emancipation became very great.

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a southerner, was to make an unjust discrimination against the southern states. The view of Justice Curtis was that the territories were acquired for all the citizens of the United States, collectively, not individually nor in state groups.²⁵¹ On the other hand the Chief Justice regarded the territories as acquired by "the people of the several States" who created the Constitution and federal government, and as held by the latter as their trustee.²⁵² That was pure states'-rights doctrine, now of merely historical interest. Resort to this political doctrine only weakened his argument.

The other weaknesses of the Calhoun-Taney theory all arise from its disregard of basic principles of property law.²⁵³

The second specific criticism of it is, that in consequence of that disregard the doctrine was utterly unworkable as a rule of actual government. Obviously, the status of a slave, like property of any other type, could exist solely by virtue of local law. As Justice Curtis said, "the rights, powers, and obligations which grow out of that status, must be defined, protected, and enforced, by such laws"—and there were *no* such laws in the free territories. If a slaveowner could take with his slave into a territory the local law that made him such, all the varying and inconsistent systems recognized in different slaveholding states must have existed in the territories simultaneously. This, said Justice Curtis, "would, if ever tried, prove to be as

²⁵¹ 60 U.S. at 626.

²⁵² *Ibid.* at 448, quoted above. See the words of the Chief Justice, quoted *ante* following note call 230, and with them compare Calhoun's resolutions of 1847 quoted in Benton, *Dred Scott Case*, 18 n. It is explicitly stated by the Chief Justice that the federal government is trustee of the "people of the several States," but he also said it was trustee to promote the interests "of the whole people of the Union."

²⁵³ Under the privileges-and-immunities clause of the Constitution a citizen has a right to take his "property" from one state into another. In the absence of the constitutional provision entrance would depend solely on comity.

So long as the property is of ordinary type, recognized as such both in the state of the owner's domicile and in the state to which he moves (or sends the property), few difficulties arise. However, even as regards such property: (1) though the *title* of the owner is perforce recognized, the *content* of the title depends wholly on local law—as respects liability to the receiving state for taxes on it and the power of that state to control its use; as respects the remedies available to the owner for its protection, and as respects the rights of third persons against it in enforcing claims against the owner, etc. Also, (2) entry of property may be delayed or wholly barred under the police power, for the health or safety of the citizens of the receiving state—either because of its inherent character, or until after treatment for disease (plants, animals), or alteration in objectionable characteristics.

When the "property" involved is recognized as such in one state but not in the other, the problems next discussed in the text arise.

impracticable in fact, as . . . it is . . . monstrous in theory."²⁵⁴

The absurdities of the theory in this respect were strikingly stated by Senator Benton:

The citizens of all the States, free and slave, are precisely equal in their capacity to carry their property with them into the Territories. . . . Either may carry the thing which is the subject of this local property, but neither can carry the law which makes it so. . . . If the citizen of one State might carry his slave State law with him into a Territory, the citizens of every other slave State might do the same; and . . . every slave State has a servile code of its own How would all these codes work together in a Territory under the wing of the Constitution, protecting all equally? No law of Congress there, or of the Territory . . . forming them into one; no law to put the protecting power of the Constitution into action, but of itself No; the thing is impossible. . . . For instance, in Virginia slaves are a chattel interest, and belong to the husband, although come by the wife, and may be seized and sold for his debts—even those contracted before marriage; or he may give them away, or devise them to his own kin, or children by another marriage. Removed to Kentucky with these slaves, they become real estate, and belong to the wife or her blood; and the husband has no more rights in them than in her land. If he removed again and got into Tennessee with his slaves, they return to their chattel condition; and go as they would in Virginia. And if he passed on as far as Louisiana, another metamorphosis of his property! For there they become real estate again—and also become subject . . . to the civil law partnership between husband and wife.²⁵⁵

A third criticism of the Calhoun-Taney doctrine is, that because

²⁵⁴ 60 U.S. at 624-25. "When any slave is sold . . . there must pass with him . . . as a kind of unknown *jus in re*, the foreign municipal laws which constituted, regulated, and preserved the status of the slave before his exportation"—*ibid.* 626.

Professor Corwin, *ante* n. 247, nowhere explicitly refers to these objections (nor to such are pointed out in n. 253) to the Calhoun-Taney theory. They are, however, absolutely destructive of it (aside from such nuisance value as it might have in politics) *unless* its purpose was to force Congress to establish by affirmative act a slave code in each territory. There is a paragraph in Mr. Corwin's *Judicial Review*, 145-46, which is quite acceptable so far as it relates to Justice McLean's claim that slavery should not be recognized as property in the territories because contrary to "natural law." But the last sentence in the paragraph, if intended to dispose of the sound arguments of Justice Curtis on the matters here referred to, would be beside the point, and utterly inadequate to that task. The idea that there *can* be in any one state at different times or in different states at the same time "the same control of property, of whatever description" (Corwin, *ibid.*) is purely conceptual, quite divorced from the realities of actual law, a sort of natural law itself.

²⁵⁵ Benton, *Dred Scott Case*, 19-20.

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the rule *was* utterly impractical one could not reasonably attribute to the framers of the Constitution an intention to establish it;—this argument reinforcing the natural inference, above referred to, expressed in the legal maxim *expressio unius est exclusio alterius*. Justice Curtis concluded his argument thus:

Is it conceivable that the Constitution has conferred the right on every citizen to become a resident on the territory of the United States with his slaves, and there to hold them as such, but has neither made nor provided for any municipal regulations which are essential to the existence of slavery?

Is it not more rational to conclude that they who framed and adopted the Constitution were aware that persons held to service under the laws of a State are property only to the extent and under the conditions fixed by those laws; that they must cease to be . . . property, when their owners place them permanently within another jurisdiction, where no municipal laws on the subject of slavery exist; and that . . . it was their intention to leave to the discretion of Congress what regulations, if any, should be made concerning slavery therein?²⁵⁶

Another consequence of the variability from state to state in the meaning of slave property is plain. Slavery could not be automatically extended to a newly acquired territory by the Constitution alone; it could be extended only after enactment by Congress of a slave code for each territory.²⁵⁷ It would be an absurdity to harbor the thought that Calhoun was not fully conscious of the facts and the consequence; and a greater absurdity to suggest such a possibility in the case of Chief Justice Taney. They were not elaborate in statements as to what legislation by Congress was permissible; they merely insisted that the *right to own slaves* in the territories existed, that it was indestructible by Congress, and that the legislative power of that body existed primarily—if not solely—to protect the persons and property of territorial settlers. Everything said by them is consistent, and nothing they said is inconsistent, with the conclusion that in their view the Constitution carried into a territory the *right to own slaves*, and that Congress was bound to extend slavery as a regulated *institution* by enactment of appropriate laws. As Senator Benton put it, and as everyone knows, Calhoun “was a man of head, and of sys-

²⁵⁶ 60 U.S. at 625.

²⁵⁷ Benton pointed this out in his *Dred Scott Case*, at 23.

tem." His objective and theory are plain. The theory being the same in Chief Justice Taney's exposition in the Dred Scott case, why should anyone doubt that he had the same objective?

Assume that in truth there was a constitutional right in any citizen of any slave state to own slaves in a territory, so that there could exist no free territory. The crowning absurdity of this doctrine was that there was logically implicit in it a conclusion destructive of the state sovereignty or states' rights to which Calhoun devoted his life. This conclusion was that there could be *no* nonslaveholding state; not even a southern slave state desiring in its postulated sovereignty to rid itself of slavery could do so. For even a state had no sovereignty against a constitutional right. Assuming that a slaveholder had such a right to property in his slave against Congress, no sensible reason—no logical, unequivocal, unevasive reason—could be given why that right would not be equally inviolable by a state. If, then, a supposedly free state, instead of a supposedly free territory, refused to recognize such property right "the damage would be the same. . . . The case would cry equally for the interposition of the Supreme Court, and it would be a case in which the court would have a clear right to interpose. For the Constitution of the United States is supreme over State constitutions, State laws, and State judiciaries"; and here again there was *implicit* in the Court's doctrine the identical objective which proslavery extremists had stated somewhat more openly in the Senate three years earlier! That the Court could have overlooked either its implication or the precedent is a highly implausible possibility.²⁵⁸ As Lincoln repeatedly said in his debates with Douglas, the decision went "very far to make slavery national throughout the United States."²⁵⁹

But now finally, consider again this supposed constitutional right. As has already been remarked, slave property was no more *recognized* by the Constitution than other property. The remarkable thing about

²⁵⁸ Benton, *Dred Scott Case*, at 22 and (for the reference to 1854) 163-70; but he does not note the parallel.

²⁵⁹ Speech at Freeport, Aug. 27, 1858—*Complete Works* (Nicolay & Hay, 1905 ed.), 3: 290. Again: "this decision does not merely carry slavery into the Territories, but by its logical conclusion it carries it into the States in which we live"—*ibid.* 5: 180-81 (Columbus speech, Sept. 16, 1859). He put this question to Douglas: "If the Supreme Court of the United States shall decide that States cannot exclude slavery from their limits, are you in favor of acquiescing in, adopting, and following such decision as a rule of political action"—*ibid.* 4: 208 (Oct. 1, 1858). See also *ibid.* 5: 120-21.

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slave property—the fact that it *was* mentioned—was due to its exceptional nature and the necessities of compromises that made its mention necessary. It has likewise been remarked that the Constitution no more recognized the right of states to create slavery than it recognized their right to exclude it. Well might Henry Clay say, in the debate on the Compromise Bill of 1850:

Now, really, I must say, that the idea that *eo instante* upon the consummation of the treaty the Constitution of the United States spread itself over the acquired country, and carried along with it the institution of slavery, is so irreconcilable with any comprehension or any reason which I possess, that I hardly know how to meet it. Why, sir, these United States consist of thirty States. In fifteen of them there was slavery; in fifteen, slavery did not exist. How can it be argued that the fifteen slave States, by the operation of the Constitution of the United States, carried into the ceded country their institution of slavery, any more than it can be argued, upon the other side, that by the operation of the Constitution, the fifteen free States carried into the ceded territories, the principle of freedom, which they, from policy, have chosen to adopt within their limits?²⁶⁰

The fact is that the South demanded and secured concessions in favor of slavery when the Constitution was framed, as the price of Union, and was simply demanding more, under the cover of Calhoun's theories, when it became clear that she could not otherwise continue her dominance in the government.

No sound basis, then, can be found for the decision of the court.²⁶¹

VII

Morris' purposes as to acquired foreign territory are revealed by the letters of 1803. *That they were very similar as regarded domestic territory is clear* from the debates in the Convention. The early drafts of the admission clause had read that "provision ought" to (or "should") be made for the admission of new states. They also provided, in compliance with the compact between the Confedera-

²⁶⁰ Feb. 5, 1850, *Cong. Globe*, 31 Cong. 1 Sess. App. 117 (col. 2).

²⁶¹ It may be added that its first decision (*ante* cxxxi-ii) can only with grave doubts be pronounced either sound or erroneous. The arguments for and against it cannot here be considered. The third decision was uncontestedly sound; consequently, even were both the other decisions wrong, the outcome of the case was legally correct. -

tion and Virginia, for the equality and republican character of such states.²⁶² Morris moved to strike the provisions that new states should be admitted "on the same terms with the original States," and that Congress might impose on them "conditions . . . concerning the public debt . . . then subsisting." He did not, he said, "mean to discourage the growth of the Western Country. He knew that to be impossible. He did not wish however to throw the power into their hands."²⁶³ In short, he desired freedom for Congress to impose upon new states such conditions, thereby creating among the members of the Union such inequalities as that body might in its discretion desire. And he did not wish, by including provision for the *one* condition of sharing liability for the national debt, to imply any lack of power to impose other conditions. The debate shows that at least a few other delegates who shared his views had in mind the Northwest Territory, as respected both discretion to admit new states and the omission of a provision for equality.²⁶⁴ The power which he desired Congress to possess over both foreign and domestic territory, was therefore perfectly expressed by the rules-and-regulations clause. It may be added that Madison made in later years the statement (one which, as it would naturally be understood, is not literally supported by the existing records) that "there was a proposition in the convention . . . declaring that the aggregate number of representatives from the states thereafter to be admitted, should never exceed that of the states originally adopting the Constitution."²⁶⁵

Notwithstanding Madison's insistence that new states "neither would nor ought to submit to a Union which degraded them from an equal rank with the other States," the Convention—after refusing to strike out, as Morris moved, a clause explicitly declaring that new states should be equals of the old, and another exceptionally allowing inequality in one matter—adopted Morris' substitute, which was practically the clause as it now stands in the Constitution, and which, omitting both clauses, evaded the issue; doubtless for a variety of reasons entertained by different delegates, with each of which its vagueness was consistent. No doubt, however, Morris' views were

²⁶² Farrand, *Federal Convention*, 1: 22, 117, 245; 2: 39, 133, 173.

²⁶³ *Ibid.*, 2: 454.

²⁶⁴ *Ibid.*, 454-55.

²⁶⁵ Letter of Nov. 27, 1819, to Robert Walsh—Farrand, *Federal Convention*, 3: 438.

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those of a minority, possibly a small minority, of the Convention's members.²⁶⁶

The rule of equality among all Union members which was thus rejected by the constitutional provision, at least to the extent of leaving the matter to the discretion of Congress, was either explicitly declared or necessarily implied in all other state papers of the Confederation era. The general idea of organizing new political communities in the transmontane area had been widespread for some time before the legal establishment of the Confederation. Plans for the creation of such communities as frontier bulwarks against the French possessions in the North and West were involved in the negotiations of the British government with private land companies on the western frontier.²⁶⁷ A private Englishman who considered that American independence would redound to the interest and glory of Great Britain suggested in 1774 the creation of various states, each "to become a party to the Grand British League and Confederacy."²⁶⁸ Surely, emigrants to the West assumed that they would be builders of new states, no matter how few of them may have left letters about such matters, or were sufficiently literate to do so. In fact the Revolutionary constitutions of two states proclaimed that to be their natural right; and although, after reflection, that declaration was omitted by them in later constitutions, the declaration of a natural right to emigrate was repeated, and in this a third state joined.²⁶⁹ That the expectation was general in the East that new western states would be

²⁶⁶ *Ibid.* 2: 454-55.

²⁶⁷ See G. H. Alden, *New Governments West of the Alleghenics before 1780* (1897), quoting at 40-41 the report of the Board of Trade to the Privy Council, from Franklin, *Works* (Sparks ed.), 5: 32; C. W. Alvord, *The Mississippi Valley in British Politics* (1917), particularly ch. 4, 12 of vol. 1 and 2, 8 of vol. 2.

²⁶⁸ John Cartwright, *American Independence the Interest and Glory of Great Britain*; see *Amer. Hist. Rev.* 30: 537-43, particularly 540-41.

²⁶⁹ Both the right to emigrate and the right to form new states were proclaimed by the constitutions of Vermont in 1777 (Decl. of Rights, sec. xvii) and 1786 (Decl. of Rights, sec. xxi) and by the Pennsylvania constitution of 1776 (Decl. of Rights, sec. xv) to be "natural and inherent" rights. And though Vermont had a boundary dispute which made these rights vital issues, Pennsylvania did not. The former's constitution of 1793 (Decl. of Rights, sec. xix) omitted the second of the two rights, but still proclaimed the first to be "natural and inherent." All these constitutions described this first right as one to emigrate to any other state "that will receive them." The Pennsylvania constitution of 1790 merely provided (Art. IX, sec. 25) "that emigration from this State shall not be prohibited"; and Kentucky included this same provision in its constitutions of 1792 (Art. XII) and 1799 (Art. X, sec. 27).

formed is plainly evidenced by the state papers of the time.²⁷⁰ Maryland's "resolution" of October 1777, which proposed the nationalization of the western lands, called for their organization into "separate and independent states."²⁷¹ It has been noted that Congress, after voting in 1780 to urge on all states the release of their land claims to the Confederation, adopted a motion by Virginia that all lands ceded should be "laid out in separate and distinct states"; and that this was amended to read, "formed into distinct republican states, and have the same rights of sovereignty, freedom and independence as the other states."²⁷² Virginia's cession offer of 1781 and actual grant of 1784 contained substantially, and her cession offer of 1783 contained identically, the same condition; and as already seen, the cession was accepted by Congress subject thereto.²⁷³ The ordinances of 1784 and 1787 for the government of the Territory Northwest of the Ohio were drafted in compliance with this compact of Virginia with the Confederation.²⁷⁴ Yet, despite all this, it is a fact that the Ordinance of 1787 purported to impose, prospectively, upon the states to be organized thereunder "substantially every provision that is to be found, by way of compact or fundamental condition, in any [enabling act or] act of admission prior to the Civil War."²⁷⁵

It may be added that all except seven of the states that have been added to the original Union of thirteen were subjected to some one or more conditions which ostensibly limited their powers as states after admission.²⁷⁶ On the other hand, Vermont and Kentucky were each admitted "as a new and entire member of the United States of

²⁷⁰ "Probably the first expression of the idea of creating independent states in the West was contained in Jefferson's proposed constitution for Virginia in 1776"—M. Jensen, *The Articles of Confederation*, 225.

²⁷¹ Oct. 15—*Jour. Cont. Cong.* 9: 807. Her "declaration" of Dec. 15, 1778 confirmed the "resolution without repeating the words"—Hening, *Statutes*, 10: 549. The same is true of her "declaration" of Feb. 12, 1781—*Jour. Cont. Cong.* 19: 138.

²⁷² *Ante*, at notecalls 50 to 53, and those notes.

²⁷³ Citations in nn. 53, 62, 63, *ante*.

²⁷⁴ The same is true of the Land Ordinance of 1785—Carter, *Territorial Papers*, 2: 12. Language identical with that quoted above from the legislative acts of Virginia and the Confederation was therefore necessarily repeated in the proceedings of Congress and in reports to it by its committees, incidental to the drafting of all three ordinances mentioned; the citation of such language would have no independent significance.

²⁷⁵ W. A. Dunning, "Are the States Equal under the Constitution?" in his *Essays on the Civil War and Reconstruction* (1898), 309.

²⁷⁶ The exceptions were Vermont (1791), Kentucky (1792), Tennessee (1796), Maine (1820), West Virginia (1863), Idaho (1890), Wyoming (1890).

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America," and every enabling act or admission act or proclamation of admission since that of Tennessee in 1796 has purportedly admitted the new member "on an equal footing with the original States"—or, in a few instances, "the other States."

The conditions ostensibly imposed have been of varied nature. Acceptance by the state of the boundaries fixed for it by Congress has sometimes been stated as a condition of admission. Very often it has been stated as a condition that the state should never interfere with the control or sale of United States land within its borders, or tax such land or other property of the Union. Some constitutional conventions have been required, in framing the constitution of applicants, to "adopt" the Constitution of the United States. Upon many the condition has been imposed of framing a constitution not repugnant to the federal Constitution; of doing things already required by its provisions to be done; or of not doing things already by its provisions forbidden. The consideration for grants of public lands made to new states for public purposes has very often been the acceptance of conditions imposed upon their use. But often the consideration for such grants has been the acceptance of conditions totally unrelated to the use of the lands granted. Many conditions ostensibly imposed have been, so far as their statement indicates, quite unconnected with such land grants or any other *quid pro quo* to balance them; that is, for none other, if any, than the grace of admission.

Imposed with or without other supposed consideration have been requirements that applicants submit a constitution in harmony with the Ordinance of 1787 or with the principles of the Declaration of Independence; that they consent to temporary exercise by the federal government within the state of powers properly exerciseable during the territorial era but undeniably open thereafter to challenge; that they abstain from taxation of public lands within the state for stated periods after the sale of such to private owners; that they maintain a "system" of free and nonsectarian public schools—required in a few cases to be conducted exclusively in English; that they assume their territorial debts; that a state (this *before* adoption of the Fifteenth Amendment) should not restrict the franchise on account of race, color, or previous condition of servitude, or should not restrict on account of those qualities the civil or political rights of its citizens; that the location of a state capital, as fixed by Congress, should not for a

stated period be altered; that the applicant's constitution should insure a perfect tolerance of religious beliefs and practices—and, in a few cases, that it should proscribe polygamy; or finally the most famous case of all, around which raged most of the great Missouri debate,—that no such laws should ever be passed by the legislature of that state as the constitution under which it was admitted to the Union declared that its legislature *should* enact.²⁷⁷

The legality of such restrictions was doubted from the beginning by some, possibly by many.²⁷⁸ The general limits within which they are effective, or on the other hand nullities, cannot here be discussed in detail. It is manifest that various of the conditions above enumerated could in no manner or degree affect the sovereignty of a state (beyond restraints of the federal Constitution), or its equality with other states, after admission. In a case in which the Supreme Court was compelled to deal with the problem in a decisive manner, and after reviewing all the precedents, it said:

The power is to admit “new States into *this* Union”.

“This Union” was and is a union of States equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. . . . we must distinguish, first, between provisions which are fulfilled by the admission of the State; second, between compacts or affirmative legislation intended to operate *in futuro*, which are within the scope of the conceded powers of Congress over the subject; and third, compacts or affirmative legislation which operates to restrict the powers of such new States in respect of matters which would otherwise be exclusively

²⁷⁷ Missouri's *legislature* accepted this condition. See J. A. Woodburn, “The Historical Significance of the Missouri Compromise,” *Amer. Hist. Assoc. Report*, 1893: 265-89; and *ante* n. 135.

²⁷⁸ Madison, at least, was one of the early doubters. Compare the following statement from a letter written by him in 1819: “As to the power of admitting new States into the federal compact, the questions offering themselves are; whether Congress can attach conditions, or the new States concur in conditions, which after admission, would abridge or *enlarge* the constitutional rights of legislation common to the other States; whether Congress can by a compact with a new member take power either to or from itself, or place the new member either above or below the equal rank & rights possessed by the others; whether all such stipulations, expressed or implied would not be nullities, and be so pronounced when brought to a practical test”—Madison, *Writings* (Hunt ed.) 9: at 6-7. Secretary Crawford, in the discussions of the cabinet, March 3, 1820, was particularly clear that no condition regarding s'avery could bind any state after its admission, whether one from the Northwest Territory or any other. John Quincy Adams' horror of slavery controlled his reasoning respecting “compacts”—*ante*. n. 135.

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within the sphere of state power . . . when a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States, and . . . such powers may not be constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which the new State came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission.²⁷⁹

This termination of the long controversy suggests that the imperialistic intent of Gouverneur Morris in so framing the Constitution's provision as to permit of conditions creating inequalities among the states has not appreciably gained, and may have lost, strength since 1787.²⁸⁰

Apart from that there are two other matters which should not here be ignored. The first is a fact: that the question of the legality of the conditions imposed by the Ordinance of 1787 upon new states to be created in the Northwest Territory is totally different from the question of the legality of conditions imposed upon states admitted under the provisions of our present Constitution. The second matter to be considered is a question. It is suggested by the probability that some members of the old Congress shared the views of the Morris group in the Federal Convention respecting the undesirability of placing new states on an equality with the original members of the Union. The question is: Does the record of debates in Congress while drafting the Ordinance of 1787 reveal any attempt to *evade* the terms of Virginia's cession?

(1) As respects the first matter, the legality of the imposed conditions was dependent on the nature of the compacts made by the ceding states with the Confederation. The nature of those compacts has repeatedly been emphasized.²⁸¹ It is perfectly plain that one of them was—as shown by the quotations just given²⁸²—that the territory ceded by the states to the Confederation should be used to develop independent republican states, prospective members of the Confederation and equals of its original members. No condition involving inequality

²⁷⁹ *Coyle v. Smith* (1910), 221 U.S. 559, at 567, 568, 573. There had been various strong dicta pointing in earlier cases to this conclusion, such as that of Chief Justice Chase in *Texas v. White* (1868), 74 U.S. 700, at 725: "there can be no loss of separate and independent autonomy to the States through their union under the Constitution."

²⁸⁰ *Ante* cxxvi-viii.

²⁸¹ *Ante* xci, cxx-xxi, n. 205.

²⁸² *Ante* lxxii, nn. 62-63. Compare *post* nn. 171-73 of Sec. IV.

could by any possibility have been reconciled with the compacts underlying the Ordinance. Taking that instrument as actually drafted, containing various conditions of supposedly binding and even perpetual nature, it is clear that actually to have adapted its provisions to the Constitution, as the act of re-enactment in 1789 *purportedly* did, would have required at the very least a careful study of the latter instrument; and that this would have revealed discrepancies between the two.²⁸³ It is equally clear that a perfect adjustment between them was impossible, since it would have required perfect prescience of our constitutional development. The men who sat in the Congress of the Confederation and in the Federal Convention and in the early Congresses of the new Union were all more or less subject, intellectually, to theories of social compact and natural law. In order to adapt the Ordinance to the new constitution, as we understand it, they must have had ideas regarding the relation of the new Union to the old, and regarding the relation between legislative and constitutional provisions, on which clarity was lacking in the general thinking of their day. Ideas on the last matter were then very vague. The delusion existed that the compact provisions of the Ordinance were of a constitutional character; that they were in fact, as "Articles of compact between the Original States and the People and States in said territory, . . . forever unalterable, unless by common consent." To that conception many references must perforce be made later.²⁸⁴ It may possibly have persisted among the generality of lawyers down to the middle of the last century. Nevertheless, since the decisions by the Supreme Court were readily ascertainable, its continuing general acceptance by historians thereafter can only be regarded as inexcusable.²⁸⁵

(2) Returning now to the second matter of inquiry. The ultimate admission of new states having in earlier declarations by the old Congress been assumed to be desirable, and such admission having been made by its compact with Virginia legally binding, it is clear that actual evasion of the requirement would have been impossible. The inquiry is merely whether there is any evidence of an *attempt* to evade or qualify it. The report of the committees that first undertook the task of framing a government for the Northwest Territory

²⁸³ *Ante* n. 180.

²⁸⁴ *Post* Sec. III, *passim*; perhaps particularly clxxxvi-ix, exciv-cciii.

²⁸⁵ *Post* nn. 28, 42, 67 of Sec. III, nn. 176, 189, 208 of Sec. IV.

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contained no language clearly intimating that the organization of "independent states" therein should eventuate in their admission to the Confederation. However, the Ordinance ultimately reported (by Jefferson) not only declared explicitly for both admission and equality, but provided imperatively *when* admission should be available as a right.²⁸⁶ In 1786, when Monroe's committee undertook to revise the plan of government that Jefferson's committee had prepared, they prefaced their plan as submitted in their first report (which became in revised form the Ordinance of 1787) with a reference to the necessity of satisfying the conditions of Virginia's grant, and logically added that a plan of "temporary" government required an indication of "the period at which it shall expire and" the "states" for which it was designed should "assume their form and equal Station in the Confederacy"; and likewise required a statement of "the Conditions upon which they shall ultimately obtain that important privilege."²⁸⁷ The great importance of the subject in the committee's opinion is further indicated by the fact that at the end of the report they added the following statement:

The object for which this temporary government is instituted being to protect the persons and rights of those who may settle within such districts in the infancy of their settlement, the United States look forward with equal anxiety to the period at which it shall cease and they be admitted, agreeably to the Condition of the Acts²⁸⁸ of Cession into the Confederacy. *This shall be the case so soon as they shall respectively obtain a common interest in its affairs, with such mature age and strength as to be able to act for themselves,* the highest and most satisfactory evidence of which is, the number of inhabitants they will contain.²⁸⁹

The committee stated the matter as one of justice to the new states, but its members and all the other delegates in Congress must have realized that to some extent, at least, the political balance (and many thought the safety) of the old states was also involved.²⁹⁰

In the course of the proceedings in Congress some changes were

²⁸⁶ See *post* ccliv-vi.

²⁸⁷ March 24, 1786—*Jour. Cont. Cong.* 30: 251.

²⁸⁸ In different reports by the committee the conditions were sometimes referred to as imposed by more than one state—*ibid.* 30: 251, 31: 669 (May 10, Sept. 19); sometimes, correctly, as imposed by Virginia—*ibid.* 402 (July 13).

²⁸⁹ May 10, 1786—*ibid.* 255; italics added.

²⁹⁰ See *post* cclxxxvi-xcvi.

made in the instrument which, considered alone, might seem to evince an inclination to evade open commitments, at least, on the compact conditions. The prefatory statement partially quoted above, and the final statement of purpose and promise more fully quoted survived through only one revision.²⁹¹ The title was shortened so as likewise to omit all reference to ultimate statehood.²⁹² Nevertheless the answer to the question before us must be negative. For all these changes were matters merely of style and redundancy so long as the text of the Ordinance provided explicitly for admission, on definite conditions, to the Confederation; and this it did from beginning to end of the debates: The ordinance of 1784 had so provided; the attainment of a definite population was the sole precondition to admission on an equality with the original states.²⁹³ The provisions of the fifth compact article of the Ordinance of 1787 were equally definite and equally imperative.²⁹⁴ And though the preamble to the compact articles merely declared a purpose of admitting the new states "at as early periods as may be consistent with the general interest" this was offset by a provision in the fifth article for admission when population attained a definite number, and admission *prior to* attainment of such population if consistent with the general interest.²⁹⁵

²⁹¹ That of July 13, 1786—*ibid.* 30: 402-3. But it seems possible that the *original* continued to have a preamble; compare *ibid.* 673 n. 1.

²⁹² The original title was: "The plan of a temporary government for such districts as may be laid out by the United States, upon the principles of the acts of cessions from individual States, and admitted into the confederacy"—*ibid.* 30: 252. In the second revision this was made to read "such districts or new states as shall be laid out"—revision of Sept. 19—*ibid.* 31: 669. It was next made to read, "for the government of the Western Territory . . . until the same shall be divided into different States"—thus on May 10, 1787—*ibid.* 32: 281 and n. 1. And finally the reading became simply: "An Ordinance for the temporary government of the Territory of the United States North West of the River Ohio." This was the last form, as it was passed on July 13, 1787—*ibid.* 313, 334, 343.

²⁹³ *Ibid.* 26: 119, 277. The character of the Ordinance of 1787 in this respect was utterly different—*ante* at notecall 275 and *post* at notecall 296.

²⁹⁴ "There shall be formed in the said territory not less than three nor more than five States. . . . Whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted . . . on an equal footing with the original States, in all respects whatever; and shall be at liberty to form a permanent Constitution and State Government; provided the Constitution and Government so to be formed, shall be Republican, and in conformity to the principles contained in these Articles; and so far as it can be consistent with the general interest of the Confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free Inhabitants in the State than sixty thousand"—Carter, *Territorial Papers*, 2: 49.

²⁹⁵ *Ibid.* 45.

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The express provisions of the Ordinance, then, quite as was required by both good faith and consistency, required admission, and assumed a prompt admission, of new states.

Moreover, admission on an equality with the old states was expressly stipulated. But that was subject to a proviso—that their constitutions should be “in conformity to the principles contained in” the Ordinance’s compact articles; and these included various requirements that were *not* authorized by the compact between the Confederation and Virginia. It also contained others to which the original states were not subject—particularly the antislavery provision and the clause prohibiting impairment of contracts.²⁹⁶ True, had the Confederation continued in existence, these provisions—being unauthorized by the Articles of that Union and unauthorized by extra-constitutional compacts between it and the old states—would not have bound the new states by virtue of the proviso in the Ordinance. Nevertheless, there would have been a seeming inequality, precisely as such seemed in many cases to exist later under the Constitution down to very recent years; an attempt to create inequality and a belief that the attempt was permissible and successful.

Is *this* to be regarded as an attempt to “evade” the requirement that the new states be the equals of the original states? Is it possible that the inconsistency was unperceived by the members of Congress?²⁹⁷ Surely one cannot assume this as respects such extraordinary conditions as those prohibiting slavery and the impairment of contracts. Each would make a state subject to it strikingly unequal to the original states. Every member of Congress must have known that the tacit agreements between states and Union respecting the western lands covered no such matters. As already said, the expiring Congress of the Confederation *acted* as though it were a constitutional

²⁹⁶ See *post* clxxxi *seq.* for a brief statment of the compacts.

²⁹⁷ Compare *ante* at notecall 213 and references in nn. 214, 231. It is a fact that down to 1912 the same inconsistency existed in many cases when states were admitted on a declared equality with all others, yet each ostensibly subject to conditions (in the enabling act or in the very act of admission) that necessarily, if binding, would create inequality; and the many very able lawyers who sat in Congress either ignored pronouncements of the Supreme Court that presaged their ultimate holding that such conditions were nullities, or considered their moral effect nevertheless desirable, or were unable to educate a majority of their colleagues—at all events the practice continued.

convention co-operating with the Federal Convention,²⁹⁸ but its actions could not alter its true character.

Jefferson's ordinance of 1784, as he first drafted it, provided that *both the temporary and permanent governments* of the "States" organized in the new federal lands should be based on certain stated principles, one being a prohibition of slavery after 1800 "in any of the said States."²⁹⁹ In other words, no distinction was made between the status of a territory and that of a Union-state. Nathan Dane went further in the Ordinance of 1787 in (supposedly) making the prohibition of slavery immediate—and, again, forever.

It seems impossible to avoid a conclusion that the equality of states seemed less important than even trivial but immediate objectives. The Supreme Court was compelled to save state equality from legislative indifference.

VIII

There are other problems of our political development which are illustrated by the peculiar terminology of the state papers of the Confederation era.

It has been seen that all parties to the controversies over western lands contemplated from the beginning the creation therein of separate and distinct "states."³⁰⁰ By the special compacts between the Union and Virginia—and later, under the new Constitution, with North Carolina and Georgia—Congress became legally obligated to admit states.³⁰¹ Madison's motion in the Federal Convention respecting the federal territory was "to institute temporary governments for new States arising therein."³⁰²

From what moment were these communities, designated as states, to exist? And when were they to have equality with the old states? Rewording these questions in general form, and with reference to later times: When the constitutional convention of a territory, acting under an enabling act of Congress, has framed a constitution, and the people ratify it and elect "state" officers as therein provided, does a "state" come into existence—which is thereafter, as such, admitted?

²⁹⁸ Compare *ante* cxxiii *seq.* and *post* clxxxvi *seq.*

²⁹⁹ *Jour. Cont. Cong.* 26: 118-19.

³⁰⁰ *Ante* lxii, clix-lx.

³⁰¹ *Ante* following notecall 53 and at notecall 63.

³⁰² *Ante* at notecall 122.

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So also if the people of the territory adopt a constitution and organize an ostensible "state" government thereunder, without an enabling act, and apply for admission—as has been done in the case of various members of the Union?³⁰³

These questions are primarily matters, manifestly, of pure political theory. Most of the difficulties presented by them disappear, however, if one first removes the ambiguities in the word "state." A territory is a state in the sense of political theory. So also is the new community organized under a constitution that provides for a *future* government independent of control by Congress. Recognition of it as *presently* an entity of a new status is implied in the wording of various public documents, including some enabling acts which have declared that the "state government" thereunder created shall remain "in abeyance" pending admission to the Union.³⁰⁴ Upon admission it acquires a third status, which is defined by its relation to the Union and to all other member states as fixed by the federal Constitution. This recognition of a state, of characteristics intermediate between those of a territory and of a Union-state, has a large history in congressional debates. It has appeared chiefly in discussions of the question whether the vitalizing act in creation of a "state"—the disputants having in mind a Union-state—is the act of admission to the Union or the acts of adopting a constitution and electing government officials by popular vote. The question becomes very simple upon removal of ambiguity from the word "state." Each of the two acts is the constitutive and vivifying act of a distinct entity.

One—a state of *temporary* character—seems clearly to arise when the act creating it is done in conformity with an enabling act of Congress under the new-states clause of the Constitution. If, on the other hand, the actions of the territorial inhabitants are without

³⁰³ In the cases of Vermont, Kentucky, Tennessee, Maine, Arkansas, Michigan, Texas, Florida, Iowa, California, Oregon, Kansas, and West Virginia. The cases of the first four, likewise of Texas and West Virginia, are manifestly distinguishable from the others. Even when a state is organized under an enabling act it may be very difficult to fix the date at which it becomes a member of the Union. Five dates have been approved, by different persons, in the case of Ohio; see J. E. Campbell, "How and When (?) Ohio Became a State" (1925), *Ohio Archaeological and Historical Publications*, 34: 45-47.

³⁰⁴ Compare that for Oklahoma, 1906, *U.S. Stat. at Large*, 34: 277, sec. 21; and the phraseology, equivalent in substance, employed in the enabling act of 1911 for New Mexico and Arizona, *ibid.* 36: 561, sec. 5 and 572, sec. 23.

sanction of an antecedent enabling act they clearly lack any constitutional basis. They have very often been characterized in the debates of Congress as "revolutionary" actions. On the other hand, particularly in the decades when "squatter sovereignty" enjoyed favor as a means of settling the slavery problem in the territories, such actions were defended by able lawyers as legitimate.³⁰⁵ Discussion in Congress of "states" of this intermediate character has occurred both in debates over the admission to the Union of communities organized without enabling statutes and in debating the status of southern states during their "reconstruction" after their alleged secession from and before their so-called re-admission to the Union. It has received virtually no attention by writers on our political system.³⁰⁶

The other act, which creates a permanent Union-state, could be taken only under the new-states clause of the Constitution.

In another way the foregoing questions and distinctions have directly impinged upon the realities of our constitutional history. No community has ever desired to continue in the anomalous position of the intermediate status. Continuance in it has nevertheless in some cases been fairly prolonged, most notably in the cases of Michigan

³⁰⁵ If there were any constitutional basis for independent action by territorial inhabitants it could only be, it would seem, the reservation "to the people," by the Tenth Amendment, of powers neither granted to the United States nor reserved "to the States." The general understanding has always been that this meant—reserved to the state governments so far as they be authorized and competent by their existing organizations to exercise the powers in question; and, so far as they be not so authorized or competent, to the people of the respective States. There are good reasons why the interpretation, "to the whole people within the national limits" (including the territories) would not have been possible. (1) "People" was undoubtedly used synonymously with what we today call "citizens"—compare remarks in *Dred Scott v. Sanford* (1857), 60 U.S. (19 How.) 393, at 404, 411, 576, 580. (2) It was the citizens of the original states who, in their conventions, adopted the Constitution and the first ten amendments, and reserved the rights in question—to themselves (and citizens of other states). (3) Before 1868 the basis of national citizenship was state citizenship—whether or not a positive act of the federal government was necessary to make a citizen of a state also a citizen of the United States. Since 1868 persons born in a territory have been citizens of the United States (and of any state in which they thereafter reside). But, to say the least, it would be extremely difficult to find reasons for the view that before 1868 a territorial inhabitant could have had federal citizenship.

³⁰⁶ W. W. Willoughby, *Constitutional Law* (2d ed.), 1: 407, refers to this fact and to its application by Orestes A. Brownson, in his *American Republic: Its Constitution, Tendencies and Destiny* (1886), to controversies of the Reconstruction era.

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and of states in the far Northwest. It is not an exaggeration to say that the acts of the people in Michigan amounted to arrant and successful revolution.³⁰⁷ The question whether the Union would permit indefinite continuance of such position has never arisen. For reasons lying in the background of the Civil War, no doubt can exist that such continuance would not be tolerated. And—to the point of pres-

³⁰⁷ The Ordinance of 1787 explicitly described the boundaries of three states to be erected within the Northwest Territory, and expressly reserved to Congress power to create either one or two additional states north of the three prescribed—Carter, *Territorial Papers*, 2: 48-49. From 1805 to 1818 the western boundary of this northern area was a north-south line "through the middle" of Lake Michigan; and in 1818 and 1835 a great area was added on the west. The territorial legislature, in preparation for setting up a state in the original eastern portion (without an enabling act of Congress), declared all congressional enactments relative to elections to the legislature and election of the Territory's delegate to Congress "to be applicable" to the western portion (March 1835); and by further acts made this mean applicable to that portion *only*. The result was to deprive the inhabitants of the entire Territory of any legislature; for its federal acting-governor refused to meet with the body chosen solely for the western portion and none was chosen for the eastern. A convention framed for the latter portion a constitution which was approved by the people, and the state government set up at the same time thereunder supposedly became effective in Nov. 1835. In April 1836, Congress acquiesced in the division of the Territory by organizing the western portion as the Wisconsin Territory as of July 3. By an act of June 15 it conditionally accepted the proffered constitution of Michigan and, the conditions being satisfied, admitted that state by act of Jan. 26, 1837.

In the meantime a federal acting-governor was in the Territory until removed in June 1836 to Wisconsin. Possibly, until then, both he and the "state" governor exercised executive power; thereafter, the latter alone. By an act of March 1836 the supposed "state" legislature declared "abolished" the judicial offices and system established by Congress in the Territory. In the preceding month the territorial federal judges had been reappointed and did not take the oath prescribed by the "state" constitution. Its legislature established another judicial system. All the judges of the Supreme Court of the Territory and the federal circuit judge thereof favored the "state" party, and two of them accepted appointment to the state Supreme Court, which began to function in July 1836. In addition to all this the legislature met three times in 1836 and passed many supposed laws. In a case involving the validity of one of these statutes, and also the validity of an act of one of the territorial judges in 1836, it was ultimately held by the Supreme Court of the state (1843) that *both* acts were valid. On further appeal to the Supreme Court of the United States that remarkable decision was allowed to stand, since the Supreme Court held that it had no jurisdiction under the Judicature Act. Under that, a statute complained of as the basis of the Supreme Court's jurisdiction must be the act of a "state"; which word that Court construed to mean *Union-state*. A complaint against an enactment of a "state" of any other kind could not be considered. The validity of another statute of the pre-Union "state" was passed upon by the Supreme Court of Ohio in 1851 and held by it to be a complete nullity.

See W. W. Blume, ed., *Transactions of the Supreme Court of the Territory of Michigan, 1805-1836* (6 vol. 1935-1940), 6: xlv-iii.

ent discussion—the same reasons greatly affected the form given to our territorial system when it was first framed.³⁰⁸

Curious differences are noticeable, as respects the use of the word "state," between the ordinances of 1784 and 1787. Nor can these be regarded as merely stylistic variations, unavoidable in documents of different (and composite) authorship. A special significance seems to attach to them.

In the earlier statute the word was employed to cover the stages of both temporary and permanent government.³⁰⁹ The phraseology

³⁰⁸ The problem was complicated and puzzling, and compromise was inevitable. On one hand there was the prevalent idea, recognized in some state constitutions, that free emigration and even the setting up of new states, was a natural right—*ante* n. 269. The danger of a state outside the Union, such as Rhode Island or Vermont, was recognized—*post* nn. 311, 312; yet only extremists ventured to declare that adherence to the Confederation should be forced. The threatened danger to large states of similar disruption had a paralyzing influence—*post* n. 241 of Sec. IV. All parties hesitated on any addition to the Confederation because of the unpredictability of its effect upon the sectional balance of power. Until after the Constitution had been adopted it was not in the least evident that all states would submit to union; and, indeed, the four that joined after that instrument had gone into effect included the two most powerful of the country. So far as regarded the likelihood that any state would *desire* to stay out of the new Union, Nathan Dane would have us believe that illiberal government was given to territories in order to lessen such a likelihood—*post* cccxxv. The case of the Western Reserve was an early evidence of its extreme improbability—*ante* lxxxi-iii; and later cases, like those of Michigan and Wisconsin—which, after warlike fulminations subsided into calm as the price of statehood—*post*, cciv-vii—made clear its virtual impossibility. In view of all these entangled uncertainties it is not surprising that the Federal Convention accepted Gouverneur Morris' completely noncommittal provision—"new states may be admitted by the Congress into this Union."

These considerations were again forced upon men's minds when the slavery controversy raised possibilities of secession. In the debates of 1849 on California Senator Berrien of Georgia, assuming a state government to have been erected in a territory under an enabling act, asked: "Can Congress reduce them to their territorial condition?" And he answered the question (doubtless from discretion) as for Missouri in 1820, thus: "If Congress imposed terms to which she was unwilling to submit, she might, as a sovereign State, though not as a State of this Union, stand aloof, and Congress had no power to reduce her to her territorial condition." Whereupon the following remarks were added: Senator Bell (of Tennessee)—"No State can exist, in any Territory of this Union, unless it be created by Congress, until it is admitted into this Union. . . . Unless we relinquish our sovereignty over it." Senator Berrien—"The sanction which is given to the people of a territory to form a constitution and State government is the relinquishment of our sovereignty *quoad hoc*." *Cong. Globe*, 36 Cong. 2 Sess. App. 255.

³⁰⁹ The first and second drafts, March 1 and April 23, 1784, are in the *Jour. Cont. Cong.* 26: 118-20, 275-79. See comments upon some later consequences of Jefferson's terminology, *post* n. 125 of Sec. III.

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from beginning to end implied that in the Northwest "states" could exist outside of the Confederation, precedent to admission thereto. Nor was the word used in the colorless sense of political theory, but with abundant connotations of American democracy. A "state" was to exist—with self-government qualified only by congressional maintenance of peace and order pending local organization—from the outset; as soon as they desired, its inhabitants could organize under the constitution and laws of one of the original states, members of the Confederation; when they numbered twenty thousand they could establish their own permanent constitution and government; and upon attaining a certain larger population such "states" should themselves be admitted into the Confederation.³¹⁰ The autonomy of these states would have been vastly greater than that of our territories as organized under the Ordinance of 1787 (and continued under all subsequent legislation), which subjected them to centralized congressional control.

Jefferson's usage of the word "state" was common in the proceedings of the Continental Congress, wherein contemplated units of frontier government were, as has been said, constantly referred to as new, republican, distinct, or independent "states." Moreover, under the circumstances of the time the usage was inevitable. All the original thirteen states were wholly separate entities until the legal consummation of the Confederation in 1781, and for some time thereafter their separateness was but very slightly impaired by the consultation on matters of common concern for which alone they were "united" in the Confederation. Originally, the Congress of the Confederation

³¹⁰ *Ibid.* In other respects than the measure of self-government allowed them, these "states" would have been, of course in the same position as the territories created under later legislation. That is, they would have been "part of the United States of America" (first of Jefferson's drafts, *ibid.* 118) or "part of the confederacy of the United States" (final draft, *ibid.* 276) in the geographical sense, having been within the collective boundaries fixed by the treaty of peace and so part of the various states united under the Articles. It seems clear, however, that the ceded territory could have been no "part of the United States" governmentally *unless* one accepts the argument hereinabove made respecting amendment of the Articles (*ante* lxxxiv *seq.*)

Distinctions in our present constitutional law (with "incorporated" and "unincorporated" territory held by the Union, and with territories classified as "organized" and "unorganized") have become complicated with respect to the phrase "part of the United States" in the governmental sense. See W. W. Willoughby, *Constitutional Law* (2d ed.). 1: ch. 26-28, 30-31. See also *ante* n. 232 on the "extension" of the Constitution to the territories.

was simply, as the constitution of New Jersey of 1776 called it, their "Supreme Council." And it is difficult to see wherein its original nature was later altered except in so far as one accepts the arguments hereinabove offered with regard to the implied amendment of the Articles in relation to territory acquired by the Confederation. Again, in further explanation of the idea that "states" might exist outside the Confederation, although geographically within the united states, Vermont never signed the Articles; and its situation was little different from Kentucky's. It may be added that seemingly only one member of the Federal Convention went so far as to declare that Vermont should be *compelled* to enter the Confederation;³¹¹—although the danger of a long-continued independence of such a state, at least on the western border, was doubtless present to not a few minds.³¹²

It is quite clear, then, that the reasoning implicit in the usage of the word "state" by Jefferson, and in other papers of the Congress, was quite in accord with the political facts of that day. It was for the most part deliberately abandoned in drafting the Ordinance of 1787 wherein the distinction between a "territory" in the technical sense and a (Union-) state was carefully observed.³¹³

Had such states as were proposed by Jefferson been actually created, our constitutional system from its inception would have included political entities of the class indicated under the second of the two abstract questions propounded at the beginning of this discussion.³¹⁴ His ordinance is in that respect unique among our important state papers. But the brief life of the enactment³¹⁵ deprived it of practical significance. Its terminology has interest merely as bearing on the question of political theory here under scrutiny. Its substantive content has much greater interest as evidencing the gap between Jefferson's liberalism and the illiberalism of the Ordinance of 1787.³¹⁶

In this latter instrument, also, there was language which implied

³¹¹ Farrand, *Federal Convention*, 2: 456. Rhode Island's acceptance of the Constitution in 1790 seems to have been greatly influenced by a fear of coercion, in addition to the likelihood that some towns in the state might secede and voluntarily join the Union. See F. G. Bates, *Rhode Island and the Formation of the Union* (1898), 192 *seq.*

³¹² See Washington to Madison, March 31, 1787—*Writings* (Fitzpatrick ed.), 29; 192; also *post* ccliv, ccxcv *seq.*, ccclvi-vii.

³¹³ See *post* n. 125 of Sec. III.

³¹⁴ *Ante* lvi-vii.

³¹⁵ *Post* cclxii-iii.

³¹⁶ *Post* cccviii.

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that "states" could exist outside the Confederation. It provided that "states" should be formed "in" the Northwest Territory, and that whenever any "of the said States" should have a certain population it should "be admitted by its Delegates into the Congress . . . on an equal footing with the original States, in all respects whatever; and . . . be at liberty to form a permanent Constitution and State Government."³¹⁷ This language (Nathan Dane's) preserves essentially Jefferson's language of 1784; and doubtless on the theory that if a "state" is to be admitted, it must be such before admission. No state could exist until after the inhabitants were politically organized; nor could they be the latter—and much less be recognized as having the republican form of government which the Constitution guarantees them (and the other states) from the moment of admission—unless organized under a constitution with complete political personnel ready for operation. Logic compelled Jefferson and Dane (who in general abandoned Jefferson's terminology) to employ the same language. The plan of *authorizing* organization as a state under an enabling act of Congress seems to have been an afterthought, applied when the first new state in the Northwest Territory (Ohio) was organized in 1802.

As respects Dane's terminology it is to be noted that while the word "state" occurs not once in the non-compact portion of the Ordinance dealing with the actual government of the Territory, it occurs fourteen times in the articles of compact which looked primarily toward the future.³¹⁸ Moreover, in the provisions of those

³¹⁷ Carter, *Territorial Papers*, 2: 49. The language of North Carolina's deed ceding to the United States in 1790 the land that became the Southwest Territory was worded thus: "the territory so ceded, shall be laid out and formed into a State or States . . . the inhabitants *of which* shall enjoy all the privileges" granted to those of the Northwest Territory by the Ordinance of 1787; and Congress, upon accepting the cession "shall at the same time assume the government of the said ceded territory," etc.—*ibid.* 4: 16; italics added.

³¹⁸ Their purpose, stated in their preamble, was "to provide for the establishment of states, and permanent government therein, and for their admission to a share in the federal councils." They were to be "the basis for all laws, constitutions and governments, which forever hereafter" should have force in the Territory. They dealt with the rights of individuals against government of all stages; with creation of "states" in the future (though employing the words quoted above in the text); and with certain continuing relations of the Confederation, on one hand, to the territory and such future states on the other.

Variant usage of the word "state" is not the only peculiarity distinguish-

articles regarding relations to the Confederation the distinction was clearly made between "the said territory, and the States which may be formed therein." Hence, although the Ordinance provided that new states should be formed "*in the said Territory*" it is reasonably clear that its draftsman (Dane) intended to apply the term "state" only to units organized from the Territory's area for immediate admission to the Confederation, and that the admission of all the states contemplated would exhaust the area and end the existence of the Territory. All of the Ordinance's language was consistent with that view, notwithstanding that the passages first mentioned would more easily carry a contrary meaning. And such was, of course, both the construction put on the Ordinance and the actual historical result.

However, the other interpretation of portions of the enactment was possible, and such interpretation, when made, was strengthened by the original delusion that the Ordinance had perpetual, or constitutional, force. To attribute to it that quality was to say that it, of itself and directly, controlled the admission of states from the Northwest Territory;—and likewise of states organized from various other territories to which the Ordinance was later extended by acts that granted to their *inhabitants*³¹⁹ "all the privileges benefits and advantages" accorded by it to the inhabitants of the Northwest Territory. And in that connection the fact was important that the compact articles were expressly declared to be made "between the Original States and the *People* and States in the said territory." This was the essential basis of the argument made, in various early cases, that the act of Congress admitting a state into the Union was not a prerequisite to the *creation* of the state and the organization of its government as such. Indeed, the extreme argument, based upon the compact, was that even the act of admission was a mere formality. The basis of these arguments, supposed to be found in the Ordinance, lost all force as soon as it became clear that the Ordinance was a mere statute, of no constitutional force. The questions themselves, however, have a long history

ing the terminology of the two ordinances. The word "district" does not occur in Jefferson's ordinance. It occurs twenty-one times in the non-compact portion of the Ordinance of 1787 (generally in a governmental, occasionally in a geographical, sense); but it occurs only twice in the compact division. The word "territory" (with about equal frequency in the two senses indicated) occurs ten times in the compact portion and three times in the non-compact portion.

³¹⁹ See *ante* nn. 207-8 and *post* nn. 68-69 of Sec. III.

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in the debates of Congress as regards the situation under the Constitution."

The two concrete questions stated at the beginning of this section have now been considered. The discussion has thrown some light on the more abstract questions that were also there stated. The first of these questions was: Does the provision, "New States may be admitted by the Congress into this Union," permit it to deny statehood indefinitely long or altogether to organized political communities within the boundaries of the Union and governed by it? This question still has significance as respects territories not within our continental boundaries, such as Alaska, Hawaii, and Puerto Rico. The second question was: What is the meaning of the word "state" in the quoted constitutional clause?—and, in particular, could it include a community of a status intermediate between that of a territory, as defined by our past history, and that of the original members of the federal Union?

These abstract questions lie as a puzzle in the background of our constitutional law. It is obvious that answers to them should depend on the appraisal of imponderables—traditional national ideals and ultimate national interest. It is equally obvious that the indiscriminating will always confuse national interest with ponderable gains in land and resources, and other tangible economic advantages of the moment. The past situations—particularly the treaties with France in 1803, with Mexico in 1847, and with Spain in 1899—which suggest them as historical problems presented contingencies that allowed of no delay for consideration of political ultimates. The tendencies toward "imperial" expansion visible in our history since 1898 make likely other situations of which no final disposition can be made without giving, ultimately, explicit answers to the questions stated.

Such answers may seem, to some, to be involved in our past action in organizing into states of the Union all continental territory acquired since 1803. That assumption necessarily involves the assumption that our national traditions have remained and will remain unaltered. It is true that all our continental territory has been incorporated into the Union. It is also true that we have incorporated that territory as states declared (save for a few ostensible restrictions on political sovereignty which were in fact illusory) to possess equality with the original thirteen. And this we have done seemingly without conscious atten-

tion to the political doctrines of our Revolutionary era, yet precisely as conscious attention to those doctrines would have dictated. And to act thus, unconsciously, exactly as conscious attention to them would have required is surely the strongest possible evidence of their continuing vigor. Indeed, if the three noncontinental territories above mentioned be admitted as states, it will only add to abundant evidence of other kinds that we are more democratic than our Revolutionary ancestors.

The fact is that at the present moment we hold territory that is "unincorporated" (in technical legal language) in the Union; and are likely to hold more; and that the status even of the territories above named remains variant and obscure as regards citizenship and the extension over them of the constitutional guaranties of fundamental personal rights. And this is true to an even greater extent of various unincorporated territories.³²⁰

All the questions under attention have received inadequate national consideration. The first question was debated in Congress with some vigor in connection with the admission of five or six states. Some aspects of the second question received attention in the same debates. They were also seemingly involved—but, it is believed, not actually—in the events and congressional debates of the Reconstruction years.

To discuss here the later aspects of their history would obviously be inappropriate. On the other hand the questions are implicit in the vague phraseology of the Constitution. Their discussion in the early period of our history when political fundamentals were the subject of endless controversy was based almost wholly on that phraseology. The state papers of the Confederation era throw considerable light on the attitudes of those who participated in the legislation of that day and in the framing of the Constitution. For this reason it has seemed worth while to consider, to the extent merely of making clear the relevant data of the Union's natal years, these problems—seemingly curious and remote, but essentially of basic importance—of our constitutional system.

³²⁰ See W. W. Willoughby, *Constitutional Law* (2d ed.), 1: ch. 30, 31, 32.

SECTION III

THE ORDINANCE OF 1787

ITSELF A STATUTE OR A CONSTITUTION? RELATION TO CONSTITUTION OF THE UNITED STATES

I

An understanding of subsequent discussion requires at the outset a statement of the contents of the Ordinance's compacts. They constitute the third and final division of the enactment, and the draftsman, Nathan Dane, prefaced them with an impressive statement of their purpose, as follows:

And for extending the fundamental principles of Civil and religious liberty, which form the basis whereon these Republics, their laws and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions and governments, which forever hereafter shall be formed in the said territory;—to provide also for the establishment of States, and permanent government therein, and for their admission to a share in the federal Councils on an equal footing with the original States, at as early periods as may be consistent with the general interest—

It is hereby Ordained and declared . . . That the following Articles shall be considered as Articles of compact between the Original States and the People and States in the said territory, and forever remain unalterable, unless by common consent.¹

Before setting out the supposed compacts included in the Ordinance it will promote understanding of what follows if a word be said of the nature of compacts. Were it not for the utter disregard which writers on the Ordinance have shown for the meaning of the word, it would be superfluous to point out that a compact in the true sense (the fictional "social compact" not being such) is a contract. The Constitution provides that Congress may consent to contracts between states of the Union, and such a contract is referred to by it as an "agreement or compact" (Article I, Section 10). Such contracts, while the states were independent, would have been treaties.

¹ C. E. Carter, ed., *Territorial Papers of the United States* (1934—), 2: 45 *seq.*, with valuable notes. J. A. Barrett, *The Evolution of the Ordinance of 1787, with an Account of the Earlier Plans for the Government of the Northwest Territory* (1891), 60-68, gives information regarding analogies to and possible sources of the compacts.

The Ordinance was in process of formulation for more than a year, but with few and trifling exceptions the content of the six compact articles had not been included in any draft of the instrument until Nathan Dane prepared, between July 9 and July 11, his draft for the first reading on the latter date—the slavery article being separately moved by him and adopted on (seemingly) the twelfth. The substance of two of the compact articles (the fourth and fifth) had earlier been approved by Congress; but merely by Congress. The reader is asked to agree, on the basis of mere common sense, to three propositions. One:—that a binding agreement or compact in a document (we are not talking of any fictional “social compact”) can only exist between definite parties; that in order for mutual promises to be binding, the persons making them must be actual and the promises actualities, evidenced by acts sufficient to signify the agreement which the parties desire to make. Another:—that of the three supposed parties, as indicated above, to these supposed compacts, the amorphous and changing body of inhabitants, present and future, of the Northwest Territory could not in common sense be such, nor could nonexistent states, the first of which came into existence only fifteen years later. And a third:—that in the absence of all evidence beyond that stated, the original states could not possibly be parties to any compact as respects matter inserted in the Ordinance by Dane between July 9 and July 11 (since, for one reason, there was no time to act upon them), though they might be parties to compacts involving the matter in the fourth and fifth articles, to which they had earlier given assent—and as a matter of fact they were and remained parties to compacts as respected the substance of the fifth article.

Taking these principles and applying them to the Ordinance, it is clear that the eight states which adopted that instrument could not make provisions therein *called* compacts binding on the five unrepresented states *as* compacts; nor even on the eight states present unless their delegates had instructions from their own states (at least from their legislatures²), as agents for such a purpose. No such powers existed. It will be seen below that the Supreme Court of the United States held a century ago that none of these supposed compacts was a compact.

² But see Madison on this—*post* n. 30.

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Compact Article I proclaimed religious liberty and the separation of church and state.

Article II proclaimed various fundamental civil rights, of which only one was guaranteed by the federal Constitution (which was in process of composition simultaneously with the Ordinance), although with a single exception all of them are almost certainly now covered by the amendments of that instrument.³ It also contained one restraint on freedom of legislative action which likewise appears in the Constitution.⁴

Article III declared that "schools and means of education" should "forever be encouraged"; and commanded, in words equally explicit but even less capable of enforcement, just treatment of the Indians.⁵

Article IV laid down manifestly fundamental principles that should control the relations between the territories and the Confederation. All these were taken from Jefferson's ordinance of 1784. They declared that the Territory and all states formed therein should forever remain part of the United States, "subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made; and to all the Acts and Ordinances of the United States

³ The guaranty of "proportionate representation . . . in the legislature" (which of course then meant only some uniform formula of representation) would be covered by the Fourteenth Amendment of the federal Constitution (sec. 2), if not by its guaranty to every state of a "republican form of government" (Art. IV, sec. 4). Of all the rest—the benefits of the writ of habeas corpus and of trial by jury, the guaranty of "judicial proceedings according to the course of the common law"; the privilege of bail for all save capital offenses; the prohibition of excessive fines, of cruel and unusual punishments, of taking any man's liberty or property otherwise than by the judgment of his peers or the law of the land, and of taking private property in case of "public exigencies" without full compensation—some have been brought, and if our traditions remain unimpaired all save the last provision could doubtless be brought, under the phrases of the Fifth and Fourteenth Amendments to the Constitution as respect the restraint of action by the federal government and by the several states, respectively; and also, as respects action by the latter, under provisions in state constitutions similar to those of the above amendments of the federal Constitution. See W. A. Dunning, "Are the States Equal under the Constitution?" in his *Essays on the Civil War and Reconstruction* (1898), 338-41.

⁴ This was the clause declaring that "no law ought ever to be made or have force in the said territory" that should "in any manner whatsoever interfere with, or affect private contracts or engagements, bona fide and without fraud previously formed." This was seemingly the first appearance of this idea in our legal system. On its authorship see *post* cclxxx-lxxx1.

⁵ Our official Indian policy, on paper, has always accorded with these declarations, but on the actual result cf. F. S. Philbrick, *The Laws of Indiana Territory, 1801-1809* (*Illinois Historical Collections*, 21), index s.v. "Indians."

in Congress Assembled, conformable thereto";⁶ that the legislature thereof should "never interfere with the primary disposal of the soil by the United States";⁷ that the inhabitants should be liable for their due proportion of the debts of the Confederation and the expenses of its government; that no taxes should be laid on lands of the United States;⁸ and that nonresident "proprietors," purchasers of public lands, should never be taxed higher than resident.⁹ An additional provision, not from Jefferson, declared that the navigable waters of the Territory should forever be free to its inhabitants and to all other citizens of the United States.¹⁰

Article V provided for creating in the Northwest Territory "not less than three nor more than five" states¹¹ with certain boundaries, and for their admission to the Confederation provided their constitutions and governments when applying for admission should be "republican"; which last was covered, after adoption of the Constitution, by its guaranty to all states of a republican form of government.

Article VI declared that there should be "neither Slavery nor involuntary Servitude in the said territory otherwise than in the punishment of crimes";¹² subject, however, to the right of slaveowners in the original states¹³ to reclaim fugitive slaves escaping into the Territory.

⁶ The history of these provisions from Jefferson's original draft of March 1, 1784 onward is given in nn. 9, 10 of Sec. IV.

⁷ See on the history of this clause n. 370 of Sec. IV.

⁸ The mere fact of federal title could not be said necessarily to exclude state taxation. As a question of desirable political relations under the Constitution, however, it was ultimately held by the Supreme Court that such taxation was impossible—*Van Brocklin v. Tennessee* (1886), 117 U.S. 151; although this view is today weakened. All save five of the nonoriginal states were subjected, on admission, to the condition stated in the text—W. A. Dunning, *Civil War and Reconstruction*, 328-30; this is probably indicative of original doubts on the question.

⁹ This protection was later assured under the privileges-and-immunities clause of the Constitution to all nonresidents of the taxing state who are citizens of another state—*Ward v. Maryland* (1870), 79 U.S. (12 Wall.) 418; although possibly not to others—W. A. Dunning, *op. cit.* 335-36. The restriction was imposed upon twenty-two states when admitted to the Union—*ibid.* 350.

¹⁰ William Grayson of Virginia was responsible for this provision—see *post* n. 371 of Sec. IV.

¹¹ *Post* *civ* *seq.* and *cclxx seq.*

¹² *Post* *cexxiii seq.*

¹³ See J. P. Dunn, *Indiana: a Redemption from Slavery* (1888), 250-51, on two judicial decisions of 1845, one by the Supreme Court of Ohio and one by a federal District Court in Indiana, which frustrated an attempt to restrict the operation of the Fugitive Slave Law of 1850 to slaves held in the

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At the end of the first part of the Ordinance—not, therefore, in form a compact provision, yet certainly subject to no amendment otherwise than by federal legislation (and, because of its nature, not honorably alterable even by that)—was a “saving however to the French and Canadian inhabitants and other settlers of the Kaskaskies, Saint Vincents and the neighbouring villages who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them relative to the descent and conveyance of property.”¹⁴

II

Discussions of the Ordinance of 1787 (aside from its legislative history) have been for the most part uncritical, both as regards its provisions in comparison with political tendencies of its time and as regards the actual operation of government under it. Older appraisals unduly emphasized the antislavery clause, as is true, for example, of the essay of 1856 by Governor Coles.¹⁵ His praise was virtually lim-

original states. The argument was, that slaves in the Northwest Territory became free if fugitive from other than those states, because no explicit provision was made in the Ordinance for their reclamation, notwithstanding the provision in the federal Constitution. Control by Congress over entry of slaves into territories was not affected by the clause of the Constitution permitting the slave trade for 20 years—Art. I, sec. 9, sub-sec. 1. See Madison's letters of 1819 and 1820 in M. Farrand, *The Records of the Federal Convention of 1787* (4 vol. 1937), 3: 436-39, 443.

¹⁴ Note that their title (“property”) was not guaranteed, only their laws or customs of conveyance and descent. See *post* ccxxx-xxxi, ccxxxix-xl, ccxlviii-ix. The vague words reflected equally vague ideas of actual conditions. “Canadians” perhaps included some Britishers. If not, “other settlers” did; likewise various Americans of various states. The “neighbouring villages” were those near Kaskaskia, not Vincennes. It was probably never possible to determine what inhabitants had “professed” Virginia citizenship, since there were no formal proceedings. How the land commissioners determined it cannot be accurately ascertained from their reports. The validity of land titles created by conveyances or descents not in conformity to the provisions of the Ordinance was never made dependent on such citizenship. I have noted nothing in the records of the land commissioners to indicate that it was ever necessary to consider irregular conveyances under other than French law; theoretically, however, other problems might have arisen both as to conveyances and descents. See Philbrick, *Laws of Indiana Territory*, (I.H.C. 21), xxiii, xxxv, lxviii, lxxi, lxxxi, ccxv (n. 2), ccxvii, ccxviii (n. 1); Carter, *Territorial Papers*, 2: 49 (n. 34).

Similarly, the Ordinance's descent provisions were not extended to Orleans Territory by the act of March 2, 1805 (sec. 5)—Carter, *Territorial Papers*, 9: 406.

¹⁵ Edw. Coles, *History of the Ordinance of 1787* (1856). Even in discussing “the history of its practical operation” he dealt almost exclusively with the antislavery clause—pp. 16-27. Even so, Mr. Dunn has pointed out

ited to that one compact article. With a broader interest but one still restricted to the compact provisions, and with uncritical hyperbole, George Elliott Howard wrote of the Ordinance that "it is those remarkable provisions concerning freedom, property, representation, 'religion, morality, and knowledge', that have caused the 'Magna Carta' of the West to be regarded as the greatest monument of statesmanship, modern or ancient."¹⁶ It did, in fact, proclaim the large traditions of Anglo-Saxon freedom under government. It has the secure honor of having enunciated various principles of our national Bill of Rights three years before they were added to the Constitution in the first ten amendments and of various other principles of our political system ultimately declared in later amendments. There is some basis, therefore, for its laudation. The question is—how much?

So far as greatness can justly be attributed even to the Ordinance's compact provisions it is because in them it proclaimed the liberal ideas which are still the most cherished tenets of our political faith. Even so, these were dominant ideals of our Revolutionary era, embodied in various state constitutions.¹⁷ The Ordinance therefore deserves no unique honor in that respect. There is, indeed, something astounding and inexplicable in the special fame that the Ordinance has enjoyed. Perhaps it is sufficiently explained by the later national struggle over the spread of slavery in the territories, which

that his statements of judicial decisions regarding the antislavery clause were utterly incorrect—*Indiana*, 242, 243. At the end of his essay he enumerated seven instances of congressional approbation of the Ordinance in extending to other territories all or some of the rights it assured to inhabitants of the Northwest Territory, and, then, concluded (p. 32) by attributing to the Ordinance *superiority* over the Constitution, "if unanimity of opinion and repetition of legislative action can give weight"! (Italics added.)

¹⁶ *An Introduction to the Local Constitutional History of the United States* (1889), 1: 141-42. Herbert Adams was probably responsible for the "Magna Carta" phrase; it was used in a book review by him of W. H. Smith's *St. Clair Papers* in 1882—*The Nation*, 34: 382.

¹⁷ See especially W. C. Webster, "Comparative Study of the State Constitutions of the American Revolution," in *Annals of the American Academy of Political & Social Science*, 9: 380 *seq.* Of the six compact articles above enumerated in the text the first two were taken by the draftsman, Nathan Dane, from Massachusetts; all the provisions of Art. IV except the last (as to navigable waters—on which see *ante* n. 10) were taken, in substance, from Jefferson's ordinance of 1784, as Dane always stated—*General Abridgement and Digest of American Law with Occasional Notes and Comments* (8 vol. 1823-1824; vol. 9, 1829, with app. 1830), 9 (app.): 76; and Art. VI, the antislavery provision, was an adoption by Dane of a motion made by Rufus King in Congress in 1785. Art. V, on the formation of new states from the Territory, expressed, as above stated in the text, a general opinion of the day.

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gave to the Ordinance's prohibition a place, as Hinsdale said, "among the greatest precedents of our history."¹⁸ To some extent fame has attached to others of its compact articles, but undoubtedly the anti-slavery clause fixed the Ordinance most deeply in the consciousness of the country. Important, too, in the political education of citizens was the enumeration in its compact articles of the "natural rights" of individuals—although this was no more true of the Ordinance than it would have been of any other repetition of them except that the Ordinance was more widely read.¹⁹ Even such a vague clause as the preachment on education must have exerted some influence on the people and on legislators. For all these reasons the ordinance undoubtedly was deserving of a creditable part of the eulogies it has received. On the whole, but with one great exception, Justin Winsor gave a fair and accurate characterization of it: "The instrument was peculiarly the outcome of prevalent ideas. . . . it was an embodiment of current aspirations, and had not a single new turning-point in human progress; but it was full of points that had already been turned."²⁰ The exception is that his statements are true of the compact articles only. Of the Ordinance's governmental plan it is not true that it "was an embodiment of current aspirations"; it was utterly reactionary—a turning back in American political life.

But as already said, whatever claims may be made for it to greatness must be limited to the compact articles. It is some credit to the old Congress that though in the struggle everywhere in progress between innovators and conservatives²¹ they showed themselves utter reactionaries, in setting up over the Northwest an illiberal government calculated to curb the anticipated excesses of its citizens, they nevertheless

¹⁸ B. A. Hinsdale, *The Old Northwest* (1888), 277.

¹⁹ "The federal constitution was not the beginning but the climax of American institutional development"—W. C. Webster, *op. cit.* at 416. "All, or nearly all the American colonies had at one time or another drawn up written instruments stating the rights of the individual as against the regularly constituted governmental authorities. . . . The bills of rights of the American Revolution are only a link in a long chain of institutional development, running back through the English Bill of Rights and Petition of Rights to Magna Charta. . . . These instruments of the American Revolution held up plainly before the view of the whole world higher ideals of individual rights than had ever been before incarnated in law, and it is at least partly the result of American example that all modern constitutional countries have come to agree approximately as to the content of individual liberty"—*ibid.* 384, 388; cf. also 411-12.

²⁰ *The Westward Movement* (1897), 285.

²¹ Allan Nevins, *The American States . . . 1775-1789* (1924), 420-69.

did heed the liberal impulses of the time to the extent of guaranteeing to those citizens the personal liberties cherished in English political tradition. Nor is the honor due the South for adoption of the Ordinance including the antislavery clause—the only one of the articles in the Ordinance's bill of rights as to which no honor must be shared by it with the federal Constitution—to be wholly denied her because her vote on that clause was not an expression of pure idealism but diluted with mundane politics.²²

III

It has been pointed out in the preceding section of this introduction that the Congress of the expiring Confederation acted as though it were a second constitutional convention.²³ In particular, in order to insure on the frontier the preservation of traditional personal liberties and proper relations between the Territory and the Confederation,

²² The Ordinance was passed by the votes of four southern, three middle, and one New England state—all that were represented in Congress. See *Journals of the Continental Congress, 1774-1789*, 32: 334 n. 3, and 343. As respects the votes of northern delegates it was apparent that passage of the Ordinance was dependent upon the sale of five million acres of land to speculators; the New Englanders of the Ohio Company could only get their 1,500,000 acres by forwarding the purchase of the other 3,500,000 for a private speculation "in which many of the principal characters in America" were participants—W. P. and J. P. Cutler, *Life, Journals and Correspondence of Rev. Manasseh Cutler* (1888), 1: 295. Perhaps (but see *post* cclxix) "The purchase *would* not have been made without the Ordinance, and the Ordinance *could* not have been enacted except as an essential condition of the purchase"—W. F. Poole, "Dr. Cutler and the Ordinance of 1787," *North American Review*, 122: at 257; compare J. P. Dunn, *Indiana*, 191-94. It will be shown below, however, that there is no evidence to support the idea that the Ohio Company demanded the abolition of slavery; and consequently no basis for the idea that this idealistic objective motivated consent by the Company's agent to the land speculation—see *post* cclxix-lxxvi. As respects the surprisingly unanimous vote of southern delegates, by a prohibition of slavery they promoted two desires of their own as mundane as those of the northern speculators: to insure a continued southern monopoly of indigo and tobacco culture by excluding competition north of the Ohio, and to promote the rapid settlement of their own slave Southwest by encouraging immediate settlement to the north, thus creating a bulwark against British or Indian aggression. See Grayson to Monroe, Aug. 8, 1787—E. C. Burnett, ed., *Letters of Members of the Continental Congress* (1921-1936), 8: 631. Grayson was then Chairman of Congress—*ibid.* 8: 599 n. George Bancroft, although he printed Grayson's letter and credited the outcome to him, characterized the attitude of southern delegates as "disinterested" statesmanship—*History of the Formation of the Constitution of the United States of America* (1882), 2: 115, 437. It is probably true, as Mr. Poole remarked, "that there was then, and for the next five years, more antislavery sentiment in the South than ever existed before or since"—W. F. Poole, *loc. cit.*, at 253.

²³ *Ante* cxliii.

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the "compact" articles were declared to be a perpetual basis for government in the states to be formed in the Territory. From that viewpoint some have thought that it—and even more so Jefferson's ordinance of 1784—might be regarded as of a "constitutional" character. Such an idea, in the sense that the Ordinance's provisions were irrevocable, as it declared, is wholly erroneous. They were constitutional only in the sense that legislation by Congress, of either the old or the new Union, was beyond alteration by a territorial legislature. The Ordinance was merely legislation of a basic nature as respected political institutions in the Territory, regarding which Congress declared that it and its successors would never change their minds; and in fact, as regards the principles embodied in the compact articles they never did. It was supposed, but in fact was only a futile attempt, "to make the territory a part of the confederacy, with certain rights, before the new states were organized, and not a mere dependency of the confederacy, without any rights of its own. . . . Between the confederacy and the territory, the ordinance was"—that is, was intended to be—"what the articles of confederation were between the original thirteen states—a bond of union, and a guaranty of the rights of the citizens of each within the territorial limits of the other."²⁴

Two clauses in the Ordinance of 1787 seem to evidence with particular clarity the operation of some common influence in the work of Congress and of the Federal Convention. Since there was certainly no formal or general consultation, but various men were members of both bodies,²⁵ this fact doubtless explains such examples of interrelation as those in question. One of these is the clause of the Ordinance providing for the recovery of slaves within the Territory if fugitives from the original states; whereas the corresponding provision of the Constitution (framed two months later) provided in almost identical phraseology for the recovery of such fugitives from one state that

²⁴ *La Plaisance Bay Harbour Co. v. Monroe* (1845), Walker's Ch. (Mich.), 155, 164. Subject to the italicized emendations these were correct statements. Compare other statements in *Hutchinson v. Thompson* (1839), 9 Oh. 52, at 66.

²⁵ Wm. Pierce sat for a time in Congress, then in the Convention, then again in Congress—Burnett, *Letters*, 8: 629. Others, like Madison, were probably steadily in attendance at the Constitutional Convention. The Secretary of Congress, in order to make a quorum, was under the necessity of "even prevailing upon some members who were attending the federal convention to return to New York"—*ibid.* xli. This does not mean that the important business of the Convention was matter of public knowledge; proceedings were very secret—E. C. Burnett, *The Continental Congress* (1941), index s.v. "Secrecy."

took refuge in another. The other clause was that forbidding the impairment of contracts; in this the constitutional provision evidences a revision and simplification.²⁶ Now, since the compact articles of the Ordinance were supposedly made virtually unalterable, and intended to be a perpetual basis for government in the states for whose creation within the Northwest the Ordinance likewise provided, both of the above provisions were intended to bind new states (first in the Northwest Territory, and later in the Southwest and other territories to which the Ordinance was "extended") precisely as the provisions of the Constitution bound the old states. Hence the idea, often expressed, that "The Ordinance was the Constitution for the Territories as the Constitution was for the States; and both were parts of the same system, and made at the [same] time, (the ordinance a few days first,) and by the same men."²⁷ Perhaps it was so intended. But the view that it was permanent, or "constitutional," although given recognition not only by historians but even by lawyers and in some judicial opinions,²⁸ was wholly erroneous. For the territories Congress could only pass laws, basic or for-the-moment as might happen, subject to repeal or amendment at any time. Manifestly it could not draft a constitution for future states. The idea that it had constitutional character, even under the Confederation, has been shown in the preceding section of this introduction to be utter error. Likewise the idea that the Ordinance was an "engagement" of the old Union, made binding on the present Union by the Constitution's prior-engagements clause.²⁹

²⁶ These provisions in the Ordinance are in Compact Arts. VI and I, respectively; the corresponding provisions in the Constitution are Art. IV, sec. 2, sub-sec. 3 and Art. I, sec. 10, sub-sec. 1.

²⁷ Thomas Hart Benton, *Historical and Legal Examination of . . . the Dred Scott Case* (1857), 37.

²⁸ Hinsdale, immediately after correctly characterizing the Ordinance as legislation ("No act of American legislation has called out more eloquent applause than the Ordinance of 1787. . . . It alone is known by the date of its enactment among all our statutes"), went on to say: "It was more than a law or statute. It was a constitution for the Territory Northwest of the Ohio"—*Old Northwest*, 277; and in one sense (not that which he had in mind) it was, as explained in the text. In his preface President Hinsdale wrote of the Old Northwest: "It was the only part of the United States ever under a secondary constitution like the Ordinance of 1787." He momentarily forgot the various territories over which the Ordinance was extended.

²⁹ *Ante* cxx-xxi, cxxiv. Those who have mistakenly believed it to be of "constitutional" character have frequently referred to it as a "treaty." Lawyers do not understand that treaties with foreign countries are not superior to the legislation of Congress, and can be rendered nugatory by subsequent legislation or lack of legislation.

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In consequence of the attitude of its framers, and for other reasons, it was natural that a practice should develop of distinguishing the avowedly modifiable and the supposedly permanent provisions of the Ordinance as respectively statutory and "constitutional." The practice was regrettable, for the misapprehensions underlying the terminology were fundamental. Their origin is to be found in then-prevalent doctrines of political theory.

IV

In order to make clear the misconception involved in regarding as "constitutional" *any* part of the Ordinance it is necessary to consider three questions: What true compacts were made in the Confederation era between the states respecting the Northwest Territory?—What was the true relation between those compacts and the Ordinance when originally enacted in 1787?—What was the situation of those compacts, and what the relation between them and the Ordinance, when that was re-enacted in 1789? Answers to all these questions have been given, in summary form and incidentally to the discussion of other matters, in the preceding section of this introduction. The answers call for more direct and emphatic repetition only because of the obscurity that long covered the subject, and the prejudices respecting it that were engendered by the slavery controversy. To begin with the Articles of Confederation, it is manifest that they were a true interstate compact of constitutional character.³⁰ It is equally clear that

³⁰ The Articles of Confederation, dated in final draft July 9, 1778, did not go into effect until ratified by Maryland, the last state, on March 1, 1781—*Jour. Cont. Cong.* 19: 214. When the new Constitution was made operative by the ratification of nine states, this involved abrogation of the Articles by less than unanimous consent. It would be a short cut to excuse this by a plea of "necessity," always available when other reasons are lacking. But Madison pointed out in *The Federalist* that some states had approved the Articles by "no higher sanction than a mere legislative ratification"; that hence—at least as to *those* parties (Madison did not go into this limitation)—the Articles could pretend to no higher validity than a treaty, and a breach of such by one party absolves all others—No. 43. These distinctions, and the resolution—manifest from an early date in the proceedings of the Federal Convention—to have the new Constitution ratified by the people, are good evidence that the nature of true compacts must have been understood by many, and presumably by most, men prominent in the political life of the Confederation era.

Now, a people politically organized are a state, and since the Constitution was ratified by conventions chosen by the people within the limits of the several states, how can it be denied that the new Constitution was a

from the negotiations relating to western lands, narrated in preceding pages, there eventuated certain true compacts between Virginia and "the Confederation," or more correctly, since the Confederation was not an independent state, with the other confederated states. These compacts have repeatedly been emphasized. They were primarily these: that Virginia should cede and the Confederation accept the Northwest; that Congress, acting for all the states, should establish government in the territory thus acquired; and that new states of republican character should thus be developed and admitted to the Union. (In addition to these compacts, there were others of which no mention has been thus far necessary, and which, with one exception, will not be involved in the discussion of the present section. That exception relates to the French inhabitants of the Illinois Country, and will be stated later.) The acts of Congress in these negotiations could not be regarded as performed by it under powers given it by the original Articles of Confederation; nor could the votes of the delegates of the several states upon them be regarded as within their powers as mere delegates in Congress. But since the agreements stated were conditions explicitly placed by Virginia on her cession, and explicitly accepted by the other states through their delegates in Congress who were empowered to accept the land and give the assurances which the conditions demanded, undoubtedly true compacts were created.³¹ Likewise (in view of the same antecedent negotiations of all the states, which related as much to North Carolina's and Georgia's claims as to Virginia's) when North Carolina and Georgia later and similarly ceded their land to the new federal Union;³² and when this

compact? Compare remarks by Chief Justice Jay in *Chisholm v. Georgia* (1793), 2 Dall. 419, 471; J. Story, *Commentaries on the Constitution* (1833), secs. 311 n. 2, 338, 352, 371; Dane, *Abridgment*, 9 (app.): 15 para. 2, 24, 25, 32, 35, 37-41, 46, 51 n.; *Downes v. Bidwell* (1900), 182 U.S. 244, 261-62. The Civil War proved, as a political fact, that unilateral abrogation would not be permitted.

³¹ *Ante*, Sec. II, at notecalls 63, 69, 100. In addition there were those (omitting those included under the compacts stated in the text): that Virginia should be reimbursed for the expenses of conquering and occupying the Northwest since the beginning of the Revolution; a reservation for the officers and soldiers engaged in these same operations; a reservation for the Virginia troops upon continental establishment, regarding alternative locations; a condition relative to the French inhabitants of the Illinois Country which will be dealt with *post* ccxxx-xxxi, ccxxxix-xl, ccxlviii-ix. See proceedings of Sept. 13, 1783—*Jour. Cont. Cong.* 25: 556-64, and 26: 113 *seq.*

³² As regards Georgia see Carter, *Territorial Papers*, 5: 18, 95, 142; as regards North Carolina, *ibid.* 4: 3, 9, 13, 18. The cession by the latter state

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Union entered into agreements with the Republic of Texas incidentally to its incorporation into the Union. Full performance by both parties of the compact with Virginia made unnecessary any consideration of its legal nature. However, when Congress desired to divide into two states the territory ceded by Georgia, whereas the deed of cession had stipulated admission to the Union undivided, the division was properly made as subject to Georgia's consent; but, that being given,³³ again no dispute over the binding nature of the compact arose. No doubt it would have been enforced (since the judicial power and original jurisdiction of the Supreme Court covered such a case) had necessity arisen.³⁴

It was an ineluctable interpretation of the above interstate compacts respecting the Northwest Territory that in their performance Congress should act as the agent of the contracting parties. The delegates of the confederated states acted ordinarily under the Articles of Confederation, and as a legislative body.³⁵ The Ordinance of 1787 was an enactment in the ordinary form of the delegates in Congress of the united states. It was totally invalid unless the delegates had powers, under the Articles or otherwise, to enact it. Attention has earlier been directed to the opinion of Chief Justice Taney that the delegates, though in Congress and though the Ordinance purported to be an act of that body, were actually not acting as members thereof

was effected under a legislative act of 1789, by a deed of 1790, and by two acts of Congress of 1790. However, the lands had been ceded by an act of 1784 subject to acceptance by Congress within a stated period, and thereafter, within that period, the act of cession was declared repealed by the legislature. No court then existed in which the effectiveness of this repeal could be challenged. See Mr. Carter's note, *ibid.* 4: 3 n. 2. Had there been, the ostensible repeal should have been held a nullity. See Samuel C. Williams, *History of the Lost State of Franklin* (rev. ed. 1933), ch. 4, 6; St. G. L. Sioussat, "The North Carolina Cession of 1784 in its Federal Aspects" (1908), *Mississippi Valley Historical Association Proceedings*, 2: 35, at 50-62; Burnett, *Letters*, 8: 145 (Monroe to Jefferson, June 16, 1785).

³³ For cession of April 24, 1802, see Carter, *Territorial Papers*, 5: 142; for condition, see enabling bill of Nov. 18, 1812, *ibid.* 6: 333, sec. 5; for Georgia's consent of Dec. 5, 1812, see *ibid.* 6: 337. In a memorial of Nov. 9, 1812 to Congress the legislature of Mississippi Territory, which had already urged that of Georgia to refuse consent, solemnly protested the proposed division. "Your Memorialists consider the People of the Mississippi Territory Parties to that contract and as such it cannot be altered or in any wise modified except by their express consent. . . . They disavow any instructions to their Representative in Congress to obtain the consent of the Legislature of Georgia to have this Territory divided"—*ibid.* 6: 331.

³⁴ See *Green v. Biddle* (1823), 21 U.S. (8 Wheat.) 1, and text below.

³⁵ See *ante* Sec. II, n. 103.

under the Articles but acting as agents of the several states under special powers. On the other hand the writer has given reasons for preferring the view that the Articles were impliedly amended as a result of the negotiations which created the three compacts stated above, and that the delegates were acting under the enlarged powers of the amended instrument. In addition to other much more important reasons earlier urged, this second view is, of course, more consistent with the language of the Ordinance.³⁶ But no matter which view be taken, it remains evident that the Ordinance must be regarded as an act taken merely by way of performing the three above compacts that preceded and underlay it. It could not be an act consenting to them; the acts of the principals required no affirmation or consent by the agents. The second of the three stated compacts was that which empowered Congress to set up a territorial government, as it did by the Ordinance. The third was *proclaimed* by it in that instrument as a promise to the Territory's inhabitants; but the compact was not thereby created or confirmed.

The two sources of misconceptions on these matters seem to be plain.

One was a disregard of the true nature of the old Congress—disregard, because its nature, and the logical consequences thereof, were plain and notorious. One of the Articles of Confederation declared that "the stile of this confederacy shall be 'The United States of America,' " but another provided that "The united States in Congress assembled" should be the repository of the powers which the Articles then proceeded to enumerate; and "united states" was of course the true description, and the more desirable because not misleading.³⁷ The Ordinance was entitled, as were the enactments of the

³⁶ See quotation of Taney's views, *ante* lxxxvii-viii, and criticisms following same. As respects the language of the Ordinance, in the fourth compact article it provides: "The said territory, and the States which may be formed therein, shall forever remain a part of this Confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made;"—which was presumably a reference to the expected work of the Federal Convention then in session—"and to all the Acts and Ordinances of the United States in Congress Assembled, conformable thereto"—Carter, *Territorial Papers*, 2: 47.

³⁷ See *ante* n. 1 of Sec. II. A failure in the Constitution to distinguish between the "United States" as a federal entity, and the "united states" when severally so described is decidedly a fault of style in that instrument, as its meaning has come to be fixed up to this time.

The best discussion of the Constitution's terminology is that by C. C.

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old Congress in general, as ordained "by the United States in Congress assembled." Even this phrase was less accurate than would have been the description "the confederated States united in Congress," for they were in fact only there and so united in the sessions of their respective delegates. The latter, outside the provisions of the Articles, were only ambassadors, and as to such other matters not plenipotentiaries. This was true as respected matters of the western lands until the Articles were amended—or, under the theory of Chief Justice Taney, until powers were conferred on them outside the Articles.

The history, earlier detailed, of the steps by which the Northwest Territory was acquired, illustrates *the complete inability of the delegates to enter of their own will and ordinary authority into any interstate compact.*

It may well be added that it seems incredible that they could possibly have been unconscious of that inability. Reading all of the state papers in which are recorded the actions of Congress and of Virginia (and other states) one can find in them no faintest trace of any implied grant to the delegates of power to alter or extend the compacts embodied in those papers, and stated above. In particular, therefore, there could be no conceivable basis for the idea that each and every provision in the Ordinance was itself a compact between the original states (or between other parties). None, to be sure, was alleged to exist unless therein called a compact; but merely calling it such could not make it one. Most of the Ordinance's provisions lay outside of or beyond the basic compacts which alone are revealed in the state papers of the time. The mere compact authorizing the establishment of territorial government cannot be made to cover the particular provisions (respecting the details of governmental organization, suffrage, taxes, personal liberties, prohibition of slavery, etc.) which the Ordinance contained. Nor did the original compact for the development of new states involve the number of these.

That even the old Congress realized the difference between the

Langdell, "The Status of Our New Territories" (1899), *Harvard Law Review*, 12: 365 at 365-77. Complete clarity today requires distinctions between "the United States" as the national entity, the "united states" as constituent units, "the states and organized territories" (organized in some special sense), and "the national territory" including all dependencies. It may be added that the opinions of the Supreme Court have never been clear of an inconsistent use, now of the singular number, now (and usually) of the plural number, in references to the United States in the sense of the federal Union.

compacts underlying the Ordinance and the instrument itself as a legislative enactment of the Congress was made plain in 1788. The provision in one of the "compact" articles of the Ordinance respecting new states being not merely uncovered by the actual compact (as respected their number and boundaries) but inconsistent with its terms, the consent of Virginia to the unauthorized provisions was sought and received.³⁸ It was admitted, then, that what the text of the Ordinance solemnly proclaimed as a compact was not originally a compact; the case is therefore not one of *altering* one of its proclaimed compacts "by common consent."

The question then arises: Was the provision a true new compact after Virginia's approval of the provision? Not unless the delegates in Congress of all the states other than Virginia be assumed to have held powers to enter into such an agreement; and all the delegates knew, of course, that in making treaties with foreign states formalities as to powers were punctiliously observed.

It has frequently been suggested that provisions which concededly constituted true interstate compacts were subject to alteration by the delegates in the old Congress; but this, in the absence of a provision to that effect in the compact would clearly be impossible, for reasons that will soon be emphasized.³⁹ It is manifest that these ideas are merely additional misunderstandings. No authority can exist for the proposition that Virginia could enter into a compact with other states by a vote of Congress *taken* without reference to instructions given the representatives of each state, and *counted* in the aggregate without reference to the vote of each state's group of representatives.

It may also be noted that, since in this case Virginia's explicit consent was deemed necessary only because the Ordinance's provision was inconsistent with the original compact, this suggests that mere acquiescence by the several states created true compacts when no actual inconsistencies were present. However, objections to this view, already urged,⁴⁰ clearly require its rejection.

If one accepts the writer's view that the Ordinance was enacted under amended Articles, the conclusion stands that all its provisions

³⁸ Carter, *Territorial Papers*, 2: 7, 48, 172.

³⁹ *Post* cxcvii-viii. Jefferson proposed such a solution for articles of his ordinance of 1784 to which he desired to give compact form—see *post* n. 54 of Sec. IV.

⁴⁰ *Ante* cxxiii-v.

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were legislation; in general merely in performance of the underlying compacts, and even as respects the altered provision approved by Virginia still mere legislation. By that action she merely waived her right to complain of the violation by Congress of the original (underlying) compact. On any theory all the provisions of the Ordinance were mere legislation unless one accepts Chief Justice Taney's view that the sovereign States tacitly affirmed all the provisions by acquiescing therein. But that, as just said, would make *all its details* compacts—not merely those of its articles which were by it so denominated and described; which is a fatal objection.

The other source of misapprehensions concerning the whole subject was an astonishing failure to distinguish between the fictional compact by which political theorists of that time sought to explain the original political organization of society, and these allegedly actually existing and binding compacts in a state paper, whose origins, gradual formulation, and authorship are matters of historical fact. This confusion was the basis for the idea that the six "compact" articles were such "between the Original States and the People and States in the said territory, and forever . . . unalterable, unless by common consent." It will be shown in this and the following section of this introduction that the great generality of historians are seemingly still dominated by the delusion that compacts existed.

The question raised is one of compacts between an individual original state and all other members of the Confederation. The authors of the Ordinance were as familiar as ourselves with private contracts and international treaties. They knew that they had no special powers from their respective original states. They knew that they could have no authority either from the unorganized body of territorial inhabitants or from states that were nonexistent. They certainly knew that a mere unilateral declaration—particularly one by an outside party, themselves—could not create legal compacts of the nature stated. However, they were also familiar with doctrines of social compact and "natural" law. As a revolutionary generation they had found those vague concepts useful political weapons. It is therefore difficult to surmise what content of fact they attributed to their own words. Possibly they were not intended to be taken, in the Ordinance, in a literal sense, but rather as a proclamation of high political ideals, to which in the conception of the draftsman people

and states mutually pledged themselves. No other force or meaning could be given to the Ordinance's "compacts" today by anyone accustomed to think of law as enforceable by the state. What meaning they have had to the historians who have immoderately eulogized them it is impossible to say; but generally, at least until very recently, they have been assumed to have been binding obligations.⁴¹ This was once common among lawyers. Even judges, including justices of the Supreme Court, long dealt with the declaration above quoted as though it had a legal meaning, to be heeded in deciding governmental problems; and the draftsman of the Ordinance, a lawyer of repute, seems to have understood his words as stating entirely sound principles of law.⁴² On the other hand Justice Curtis, in his opinion in the *Dred Scott* case, made the following sensible remarks:

The Congress of the Confederation had no power to make such a compact, nor to act at all on the subject; and after what had been . . . said by Mr. Madison . . . in the thirty-eighth number of the *Fed-*

⁴¹ See *post* n. 67.

⁴² See *post* n. 123.

Nathan Dane, in his *Abridgment*, made a studied attempt to answer the declaration made in 1820 by his fellow committee member of 1786, Charles Pinckney, and the arguments of Senators Hayne and Benton, that the articles of the Ordinance were "an attempt to establish a compact, where none could exist, for want of proper parties"—see his *Abridgment*, 7: 443 *seq.* No one who desires to measure the strength of the social compact theory at that time (with large allowances, to be sure, for the effect of advocacy on a lawyer's mind and pride on an author's mind) should overlook this fantastic production. Aside from such evidence as that given *ante* n. 30 to indicate that a lawyer like Dane could hardly have been so naive, other reasons for believing that he could not have believed what he argued are given *post* n. 55 of Sec. IV.

Governor St. Clair recognized (1795) that nonexistent states could not be parties—W. H. Smith, *St. Clair Papers*, 2: 382. A committee of Michigan citizens pointed out (1809) that "the future inhabitants of an uncultivated wilderness" could not be parties—Michigan Pioneer and Historical Society *Collections*, 12: 545; and the legislature of Orleans Territory, in 1810, recognized that the Ordinance was mere legislation—*post* n. 71. However, St. Clair had also agreed in 1788 with Judges Parsons and Varnum that the Ordinance's provision on decedents' estates (Carter, *Territorial Papers*, 2: 39) "must be considered 'as a compact between the United States and all the settlers', and can not be altered by a declaratory act"—*ibid.* 3: 277. Secretary Gallatin (1802) thought the boundary provisions "could not until the admission of the State [Ohio] in the Union . . . be alter'd without the consent of the people of the territory, of Congress & of Virginia"—Library of Congress: Jefferson Papers, under April 30, 1802. Above all, Joseph Story assumed the validity of the compacts, their obligation attaching to parties (seemingly states) nonexistent in 1787, "when they were brought into life"—*Commentaries on the Constitution* (1833), sec. 326 n. 1; and see sec. 1328. It was Dane's argument that there was "a system of [land]

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eralist,⁴³ I cannot suppose that he, or any others who voted for this bill (namely that of 1789 that re-enacted the Ordinance of 1787) attributed any intrinsic effect to what was denominated in the ordinance a compact between "the original States and the people and States in the new territory"; there being no new States then in existence . . . with whom a compact could be made, and the few scattered inhabitants, unorganized into a political body, not being capable of becoming a party to a treaty, even if the Congress of the Confederation had had power to make one touching the government of that territory.⁴⁴

It may be added that the Ordinance of 1787 had no legal existence under the new Union except through its re-enactment in 1789 by the new Congress, and that that body, under the powers granted to it in the Constitution, had no authority whatsoever to make any compacts binding upon any of the parties mentioned (or even binding upon itself in relation to them)—or to represent the states, who alone of the parties mentioned could enter into compacts, in making such.

These supposed compacts were also declared to be "forever unalterable."⁴⁵ Assume that the delegates in Congress had been em-

sales and government binding on all [individuals] who agree to buy and settle under it . . . and who become parties to the system, as they buy and settle under it"—*Abridgment*, 7: 443. Buyers voluntarily subjected themselves to a contract, nothing more. Settlers were subject, willy-nilly, to local government. Dane's imaginary "system" was conceived as a basis for imaginary consequences.

Some judicial comments on the supposed compacts have been given, *ante* in n. 101 and at notecalls 174, 186 of Sec. II.

Justice McLean said, on circuit in 1838: "This compact was formed between political communities and the future inhabitants of a rising territory, and the states which should be formed within it. And all who became inhabitants of the territory made themselves parties to the compact. And this compact so formed could only be rescinded, by the common consent of those who were parties to it"—*Spooner v. McConnell* (1838), 1 McLean 337, 344. Less irrational was a suggestion of the Supreme Court of Ohio: "There was in reality but one party to it originally, and that was the general government. But when application for admission into the union was made by the people . . . [of Ohio], modifications in several parts of the Ordinance were asked for, and they were granted by the United States as one party, to the state, as the other. This seems to show that the people of Ohio have, so far, treated the articles of compact as of perpetual obligation. The alterations proposed . . . were of no importance, if the state should have a right to annul the ordinance the moment it assumed that condition. The state may thus, by its own act, have converted that into a compact which was before only a fundamental act of Congress"—*Hutchinson v. Thompson* (1839), 9 Ohio 52, 62.

⁴³ See *ante* lxxxiv-v.

⁴⁴ 60 U.S. at 617.

⁴⁵ By an enabling act of 1854 for Colorado, Congress had ostensibly committed itself to admit that Territory as a state, whether organized as a free

powered to create them, as respected the original states; even so, it is manifest that in that case, for lack of a court to enforce them, until after 1789 they could have had only the uncertain permanence of any treaty between sovereign states. The fate of the Articles of Confederation exemplifies such impermanence. It is also evident that while the Confederation endured, alteration of these compacts—which necessarily could not be unilaterally effected—required action, literally, by the several confederated states. A mere vote by the united states *as* in Congress assembled could not possibly satisfy that requirement; for some of the states might not at the time be represented; or some states, though represented, might have no vote because of their delegates being divided in opinion; or some states might be present and vote, but against the proposed alteration.

The situation became very different under the present Constitution. Sovereignty was now divided, and the powers of government were distributed to a much greater extent than under the Articles. Within the spheres of action assigned exclusively to the federal government, Congress became, although not technically the repository, at least in fact and over a vast field of action the wielder of sovereignty. One of those spheres was the government of territories and admission of new states. As to those matters the states retained no powers whatever. Consequently, it would seem that action by Congress after 1789 in alteration of a compact supposedly made within that field by the Confederation (and *if* made, then necessarily confirmed by the Constitution as an obligation incumbent on the new Union), must be recognized as representing action by "the original states" as original parties to the compact. Was it necessary to procure consent to such alteration from the other party to the compact, Virginia? That it was not necessary seems clear. But if one assumes the necessity, how could her consent be effectively given? We shall see that in certain actual cases her legislature purportedly gave consent; but it is difficult to see how action by a merely legislative body, when Virginia

or a slave state—that is, had "committed itself if it had the power to do so." It was "a complete delegation of the power, which the very passage of the act itself implied to have resided in Congress before that time, to the people of the Territory"; namely, the privilege of fixing their domestic institutions. Admission was not asked for until 1866. In the meantime another enabling act of 1864 had ignored that of 1854. The quotations are from remarks by Senator Edmunds of Vermont, *Congressional Globe*, 39 Cong. 2 Sess., at 199 (col. 3), 215 (col. 1).

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no longer had any legislative powers, could constitute action by her as a sovereign state or be, therefore, legally binding. Politically, as a matter of honor, and for the purpose of satisfying the other original states, such action might be sufficient; and since it was in fact acceptable to them no issue as to its efficacy ever arose.

In what has been said, true compacts have been postulated. But the situation was wholly different as regarded all the supposed compacts in the Ordinance of 1787. The parties to these "compacts" as therein named were: the people of the Territory (or territories into which it was divided—or other territories than the Northwest Territory to which the Ordinance was in whole or part extended), the future states formed therefrom, and the thirteen original states. But none of these "compacts" was in truth a compact unless it merely reproduced one of the actual compacts that underlay the Ordinance. They were otherwise merely legislation by Congress—both in 1787 as within its powers by implied amendment of the Articles of Confederation and in 1789 under the exclusive powers vested in Congress by the Constitution. The ideas that any subsequent action by Congress (or by other parties) could constitute violation of one of these so-called compacts as a true compact, and that it might be necessary to secure consent to the action of Congress from some or all the enumerated compact parties, were mere delusions.

At the most, too, the right of a state to enforce such compacts against another could have endured only while the parties to them retained sovereignty as respected the matters therein involved. But they lost sovereignty, for example, over territorial government and the admission of new states. Hence, so far as Congress would have been held to hold *discretionary* power over those fields, no posited compact could have been enforced contrary to that discretion as respected personal liberty, religion, education, slavery, or the admission of states on attainment of a population of sixty thousand free inhabitants under Compact Articles I, II, III, VI, and V. A court could only have ascertained the *nature* of those provisions and the nature of the power granted to Congress over the matters with which they dealt. That is all, too, that could have been ascertained respecting the boundary provisions of new states set out in Article V. And as respects Article IV, we know, looking backward, that no action by any state could have amounted to more than a prayer that the Con-

stitution be enforced, for it covered all of that article's provisions. It merely happened—not indeed fortuitously, but for good reasons already adverted to—that the Ordinance's provisions were not inconsistent with those of the new Constitution, except that some went far beyond the latter apart from its subsequent amendments. Until after the adoption of these, interstate compacts in the Ordinance, as to matters over which the states retained sovereignty, could temporarily have been enforced as such by action between states.

In short, there was not much in the Ordinance's "compacts," even assuming them to have been such, of a "forever unalterable" character. They ceased, virtually, to have meaning after the Constitution and its Bill of Rights had been adopted. But it is a pity that no state, by action on an alleged compact, did not earlier cause the Supreme Court to clear up problems of the nature of the Ordinance and of its relations to the Constitution.

The actual nature, actual treatment by Congress and other branches of the government, and actual effects of these supposed compacts of the Ordinance constitute the topics (for they long since ceased to be questions or problems) to which the rest of the present section will be devoted.

V

The general legal situation under the Constitution was very different from that under the Confederation. Since the two Unions were totally distinct, and no obligations of one passed by mere succession to the other, affirmation by the new Union to the basic compacts underlying the Ordinance was a necessity to their continued existence.⁴⁶ There were no continuing unperformed duties on the part of Virginia or other states that required recognition by them;⁴⁷ they had ceded their land claims, and the Union had taken them over. But it was absolutely necessary that there be an assumption by the new Union of its correspondent obligations. This was done by inserting in the Constitution the provision that "all . . . engagements entered into before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Con-

⁴⁶ All those enumerated *ante* in text preceding notecall 31 and in that note.

⁴⁷ None on the part of Virginia. As respects North Carolina and Georgia, the Confederation only had assumed an obligation—*ante* n. 166 of Sec. II. North Carolina was bound the instant she voted cession—*ante* n. 32.

federation.” No further action was ever taken, or needed. Vested rights in property were of course protected then as now;⁴⁸ the insertion in the Constitution of the impairment-of-contracts clause illustrated that attitude. The compacts now in question created property rights in the Union. Their importance, too, was beyond exaggeration. They had been the indispensable means of establishing the Confederation, and the land cessions which were the consideration for the obligations assumed by the Confederation were considered essential for payment of its debts and for successful maintenance of continental unity.

The compacts actually made between Virginia and the Confederation were, then, confirmed by the Constitution. The re-enactment of the Ordinance in 1789, and all later legislation respecting the Northwest Territory, presupposed the continuing validity of the compacts. Even in judicial opinions, when discussing the status and effects of the Ordinance under the new Union, it has been common practice to refer to it as the Ordinance “of 1787.” Obviously, however, it was only as the re-enactment of 1789 that its constitutionality and effects could come before the federal courts, or be otherwise considered. Confusion has entered into the matter of its re-enactment, with reference to the effects of that action by the Congress of the new Union.⁴⁹ Manifestly, it could have no effect beyond the powers of Congress under the Constitution. Manifestly, that body, even more clearly than its predecessor, could create no compacts between any states, for it had no powers on the subject;⁵⁰ nor could its acts have even the sem-

⁴⁸ *Terrett v. Taylor* (1815), 13 U.S. (9 Cranch) 43; and *re* compacts today between a state and the United States respecting property held by either party see W. W. Willoughby, *The Constitutional Law of the United States* (2d ed. 3 vol. 1929), sec. 174.

⁴⁹ See *ante* cxix *seq.*

⁵⁰ Similar compacts later made with North Carolina and Georgia, incidentally to receiving cessions from them, fall under the power to acquire territory, as matters essential to the exercise of that power.

The Constitution empowers Congress to authorize agreements between the several states—Art. I, sec. 10, sub-sec. 3; but with this the Ordinance did not have, nor purport to have, anything to do. Moreover, although that constitutional clause does not read “*subsequent* agreement or compact,” that would seem to be its necessary reading, since the instrument was one providing for the future. The agreements underlying the Ordinance had been made in 1784 and were confirmed, as “engagements entered into, before the adoption of this Constitution” by Art. VI, sec. 1.

But quite aside from these provisions, the Ordinance was not, itself, a compact, and it contained no compacts. It merely presupposed certain compacts. The existence and content of these—and the nonexistence of the

blance of such an effect, since it was not (as the old Congress had been) a participant in negotiations between sovereign states with whose actions its own could be confounded.⁵¹ In 1789, even more plainly than in 1787, the Ordinance was necessarily mere legislation.

This conclusion is supported by decisions of the Supreme Court through a full hundred years. When questions of its legal nature and effect were ultimately presented to the Supreme Court, its so-called compacts, "forever unalterable unless by common consent," were held to be no more than solemn pronouncements of prospective national policy, necessarily limited by the powers of Congress as a merely legislative body, and hence with the characteristics of ordinary legislation. As such, it could have no permanence beyond that which it might enjoy by grace of abstention by Congress from thereafter revoking or modifying it.⁵² Aside from the very rare cases in which

others—are proved by the state papers of Virginia and the proceedings of Congress.

⁵¹ Professor R. W. Effland, in a very useful note on the navigable-waters clause of the Ordinance, submits the questions (1) whether re-enactment of the Ordinance in 1789 could be held to "constitute Congressional consent to a compact between States" (under Art. I, sec. 10, sub-sec. 3 of the Constitution), taking the Ordinance as "a contract or treaty between the original states and the people of the Northwest Territory, and, therefore, states formed out of that territory"; and (2). "why has the Ordinance never been treated as a compact within this article?"—*Wisconsin Law Review* (1939), at 549 n. 16. The answers to these questions, as the writer sees the matter, are given in the preceding note.

⁵² Taking it *as legislation*, and remembering that its wording was not altered when re-enacted in 1789, what could "unalterable, unless by common consent" actually mean? It could only mean, in the days of the Confederation, unalterable save by "the united states in Congress assembled"—that is by the Congress; the quoted words being merely those by which that body was described in the Articles of Confederation in conferring powers upon it, and employed in all its enactments, and therefore not to be understood as indicating that the Ordinance had any unusual character. I infer that Mr. Burnett would read "consent of the United States in Congress assembled" as "consent of the united states as assembled at any time in Congress," assuming the required quorum; not as the equivalent of "consent of the united states"—Burnett, *Letters*, 8: 194 n. 7. I would so read the first phrase myself.

But this does not affect the fact that the "Original States" (not "in Congress assembled") were *named* in the Ordinance as parties to the supposed compact. Their individual consent was therefore essential *if* there had actually been any compacts. The practice followed was consistent only with the view that there were no compacts.

Jefferson's ordinance of 1784 contained a provision that the inhabitants of the Northwest Territory should be subject "to the government of the United States in Congress assembled." This was struck out, and replaced by a provision that they should be subject "to the Articles of Confederation"—April 20, 1784, *Jour. Cont. Cong.* 26: 248-49.

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action of Congress is taken once for all time,⁵³ the words "forever" and "unalterable" can only mean "until hereafter modified or repealed." And as Justice Curtis said in his *Dred Scott* opinion:

Of the political reasons which may have induced the Congress [of 1787] to use these words, and which caused them to expect that subsequent legislatures would conform their action to the then general opinion of the country that it [the antislavery clause of the Ordinance] ought to be permanent, this court can take no cognizance.⁵⁴

As a matter of fact, President Monroe's cabinet in 1820 formally considered the question whether the word "forever" in the Missouri Compromise of that year could bind any state created from a territory subject to that restriction, and all save John Quincy Adams, including John C. Calhoun, gave written opinions to the contrary.⁵⁵

It was plain at the time of the Constitution's completion that one of the Ordinance's "compacts" was common to the two instruments; and others were later held by the Supreme Court to be covered by clauses of the Constitution.⁵⁶ Beyond this the Ordinance had no constitutional "character" except in the sense that, as a statute, it conformed to the Constitution, including the grant of power to Congress to control the territories by legislation—freely modifiable. Only to this extent did the Ordinance's "compacts" have any permanence beyond the power of Congress to nullify the rights they recited. But, since Congress in repeating in a statute the words of the Constitution does not create those rights, it could, of course, have removed such repetitions from its statute.

At the present time, it might seem superfluous to cite authority,

⁵³ As in the admission of a new state. Even then the action is subject to judicial inquiry as to whether state action conformed to the congressional enabling act and whether the result accords with the Constitution. Thus, if Congress, as a condition put upon the admission of a state to the Union, requires its constitution to contain certain provisions, and later approves the constitution and admits the state, it is still for the Supreme Court to say whether the state constitution is repugnant to that of the United States—*Gunn v. Barry* (1872), 82 U.S. (15 Wall.) 610.

⁵⁴ 60 U.S. at 628; where he in fact gives authority, though just stated to be unnecessary, on the point preceding this quotation.

⁵⁵ The questions put to the cabinet are stated, and a summary of discussion by its members given, in the diary of John Quincy Adams under dates of March 3-6, 1820—*Memoirs*, 5: 4-15; likewise in his *Writings* (Ford ed.), where the written answers of Adams, Crawford, Calhoun, Wirt, and Thompson are also to be found—7: 1-2. Senator Benton called attention to this in his *Dred Scott Case*, 99-100.

⁵⁶ *Ante* at notecalls 3 and 4.

even to laymen, for legal propositions seemingly so elementary as those above stated. Unfortunately, however, popular assumption long ran counter to them. One reason for this was, presumably, the perdurance of theories of natural rights and social compact. Another, doubtless, was that the Ordinance's antislavery clause became a theme of political oratory before the Supreme Court spoke on the subject. In consequence, popular assumption was supported by the dicta of statesmen, by some practices of Congress, and even by some judicial decisions. All this is particularly true of the compact articles.

Subject to a very slight hesitancy one may say that it was true of those articles alone. The hesitancy is due to the fact that with reference to matters indubitably within the discretion of Congress that body sometimes acted as though it were constrained by the Ordinance.

An illustration may be given in the matter of territorial and state boundaries. The power of Congress to establish and alter at will the boundaries of territories was unquestionable, and was from the beginning freely exercised in the Northwest Territory and elsewhere.⁵⁷ Yet in an act of 1805 relating to the Territory of Orleans, Congress "reserved" a power to alter its boundaries prior to admission as a state.⁵⁸ The Ordinance of 1787 had been extended to that Territory; perhaps it was realized that there existed misunderstanding as to which parts of that instrument were unalterable, so that political expediency made it desirable to "reserve" the power explicitly.

The situation in respect to state boundaries was very different.

⁵⁷ The "territory" or "province" of Louisiana acquired by cession from France (created Oct. 31, 1803—*U. S. Stat. at Large*, 2: 245; and compare law of March 19, 1804—*ibid.* 2: 272) was divided by the act of March 28, 1804, which created the Territory of Orleans and the District of Louisiana—*ibid.* 2: 283, secs. 1, 12. The same power was exercised in twice dividing Indiana Territory, in creating Michigan Territory in 1805 and Illinois Territory in 1809—*ibid.* 2: 309 sec. 1, 514 sec. 1; in dividing the Territory of Orleans, adding a portion to Mississippi Territory in 1812—*ibid.* 2: 734; in dividing Illinois Territory and adding part to Michigan Territory in 1818—*ibid.* 3: 428 sec. 7; etc.

⁵⁸ March 2, 1805—*U. S. Stat. at Large*, 2: 322 sec. 7; Carter, *Territorial Papers*, 3: 405. And note, next page, what it did in 1836 in altering the boundary of Michigan Territory and the state of Ohio. A clause declaring retention of this power was included in the organic acts of the following territories (in all save that of Arizona as a power to divide or change the boundaries and to add any portion to any other territory or state): Wisconsin, Oregon, Minnesota, Utah, New Mexico, Nebraska and Kansas, Nevada, Dakota, Arizona, Idaho, Montana, Wyoming, and Oklahoma. But it was not inserted in the Washington statute—although parts of Utah and Washington territories were added to Nebraska. The clause was meaningless.

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and somewhat difficult. In advance of any land cessions to the Confederation the Congress had in 1780 engaged, were such cessions made (as it urged), to create in any territory ceded new states, which should ultimately be admitted to the Union as equals of the original states. Its resolutions unquestionably constitute one of our greatest state papers as a matter of national policy, yet there was included in them an astoundingly fatuous provision making these prospective states *squares*, and fixing a small maximum area for each.⁵⁹ Land cessions were made in reliance upon these stipulations, and even repeating them as a condition of the cession, so that true compacts resulted (assuming in Congress a power to act which in fact the circumstances conferred). When more was learned of the Northwest's geography, and political problems pondered, it became obviously necessary to alter these compacts. Congress asked Virginia's consent to the creation of not less than three nor more than five states—necessarily larger than those originally stipulated; but, no action being taken by her, passed the Ordinance of 1787 with that provision, the boundaries to be as it stated "as soon as Virginia [should] alter her act of Cession and consent to the same," which she eventually did.⁶⁰ However, upon this supposed substitution of a new for the original compact *no* states formally acted; there was merely the vote by the uninstructed delegates of the eight states that passed the Ordinance, and a later consent by the legislature of Virginia. The last might reasonably be regarded as sufficient, the former could not possibly be so regarded, as earlier explained.

Now, the discretion given Congress by the Ordinance was to create two additional states "north of an east and west line drawn through the southerly bend or extreme of Lake Michigan." If only three states were created their northern boundary was the international line with Canada. If five were created the northern boundaries of the southern tier were not explicitly stated, but it was inferentially plain that it was to be the east-west line through Lake Michigan's southernmost point. Moreover, the east and west sides of the three southern states were explicitly stated, but none *otherwise* indicated for the two northern states should such be created. It is again inferentially plain, however, that

⁵⁹ Oct. 10, 1780—*Jour. Cont. Cong.* 18: 915.

⁶⁰ The Ordinance—Carter, *Territorial Papers*, 2: 48; request by Congress on July 7, 1786—*Jour. Cont. Cong.* 30: 390-94; Virginia's consent, Dec. 30, 1788—Carter, *op. cit.* 2: 172.

their east and west sides were to be the portions of those sides, as described for the southerly states, which were north of the east-west line through the southern extreme of Lake Michigan. One consequence of this last inference is that what is now Michigan's Upper Peninsula would have been within Wisconsin. But note that, strictly speaking, there were no compacts in the Ordinance regarding boundaries; like all the rest of its detailed content, there was nothing of that nature unless calling a thing by one name or another alters its nature.

Actually, Congress ignored both of the two lines mentioned. In consequence of this, Ohio, Indiana, and Illinois all profited at the expense of their northern neighbors, and Michigan at the expense of Wisconsin. Confusion was not confined to the Ordinance. It was aggravated by the inconsistency of Congress in sometimes assuming the compact character of that instrument's boundary lines, and sometimes assuming the contrary. The enabling act for Indiana required the people "interested" in the boundary changes it involved to ratify them, and the same requirement, in substance, was imposed on Illinois. When Ohio's northern line was corrected in 1836 to include a claim made in her constitution, under which she had been admitted in 1802, Congress offered Michigan in exchange for this trifling loss in the south her present Upper Peninsula;—taking this out of what was then Wisconsin *Territory*, but with the result of ignoring an Ordinance line for the *state* of Wisconsin when that should be admitted. And the people of Michigan, as the price of admission to the Union, were required to ratify this exchange—which, after talk of arms, they sullenly did; but Wisconsin's consent was never asked in that case or with respect to the northern boundary of Illinois.⁶¹ Intense resentment was

⁶¹ See R. King, *Ohio* (1888), 356-61; T. M. Cooley, *Michigan* (rev. ed. 1906), 214-25; R. G. Thwaites, *Wisconsin* (1908), 232-40 and "The Boundaries of Wisconsin" (1888), *State Historical Society of Wisconsin Collections*, 11: 451-501; Mrs. F. J. Sheehan, "The Northern Boundary of Indiana" (1928), *Indiana Historical Society Publications*, 8: 289-321; A. M. Soule, "The Michigan-Indiana Boundary" and "The Southern and Western Boundaries of Michigan" (1897), *Mich. Pioneer and Hist. Soc. Collections*, 27: 341-45, 346-90. Both Mr. Thwaites and Judge Cooley (see *post* n. 67) wrote as though they believed in compacts—Mr. Thwaites decidedly so throughout his paper. A quotation by Judge Cooley (*op. cit.* 219) from John Quincy Adams indicates that he must have shared such views.

See also the acts of March 2, 1827, *U. S. Stat. at Large*, 3: 236; of March 2, 1831, *ibid.* 3: 479; and of June 23, 1836, *ibid.* 5: 56. These acts would all have been violations of the compacts of the Ordinance if its provisions had been compacts. No violation of Virginia's original compacts with the Confederation was involved; her stipulation regarding the size of new states

aroused by Congress' disregard of the Ordinance lines. There was talk of secession in Wisconsin; a governor of that state issued a proclamation to Illinois inhabitants "within the ancient limits of Wisconsin" to vote on joining that state; Ohio passed an election act for citizens certainly then residents of Michigan; Michigan passed a statute making highly penal any exercise of office under the Ohio law; both Ohio and Michigan called out their militia. Important economic interests were involved, too, though the Upper Peninsula then was mere wilderness, and Toledo and Chicago meant virtually nothing. Looking back, one can see only politics and the fervor of Jacksonian democracy.

The basis, however, of all the trouble was the fog surrounding the Ordinance's compacts. The truth is that its boundary provisions, along with the population requirement for new states, had received much attention, before and during the framing of the Ordinance. None of its other "compacts" was—none could be—so definitely stated. How could true compact character be denied to these and attributed to other alleged compacts? It seems remarkable that, once these "exceptions" were made to the supposedly super-statutory inviolability of the Ordinance's "compacts," anybody (and particularly distinguished judges) could have spoken as though any of its provisions were actually of that character. The Illinois case was in fact a departure from the Ordinance that had vast importance. It extended that state northward sixty-one miles beyond the "Ordinance line," thus giving it the site of Chicago and an adequate lake front, with the avowed purpose of tying its loyalty to the North rather than to the

being broken, she *waived violation* of that when the Ordinance as passed was submitted to her for that purpose (*ante* n. 38), but could not by so doing give any special character to other details of the instrument, such as boundaries, beyond that given them by the votes in Congress of her representatives and those of other states. The acts affecting Michigan's boundaries with Indiana and Illinois are in *U. S. Stat. at Large*. 3: 289, 428.

Had there been involved no seeming violation of a provision of the Ordinance, of course Congress would have been free to fix the boundaries assigned to any of the states mentioned upon their admission to the Union. If imposed as "conditions" upon the state admitted (this was the case as respects the Illinois boundary), such conditions would be perfectly valid, since obviously they could not affect the sovereignty of a state after admission.

In 1801 the legislature of the Northwest Territory gave its "consent" to a change of boundary which would have created a state out of the western part of Ohio and the eastern part of Indiana as those states exist today—see Carter, *Territorial Papers*, 3: 220 n. 18. This was merely proffered "consent," based on reasons of territorial politics, and was not accepted by Congress, which created Ohio with boundaries as defined in the Ordinance.

Mississippi and the South, an objective manifestly important in 1818 and fully realized (though perhaps primarily for other reasons) before the Civil War.

As respected provisions in the compact articles involving vital political interests, their constitutional character was generally and unquestioningly assumed. Jefferson, when he drafted his ordinance in 1784, assumed, as will later be noted, that it would establish forever a basis for territorial organization; he proposed that at least a portion of it should be put in the form of *true* compacts.⁶² The same assumption underlay the Ordinance of 1787; but there is no evidence that any of its framers intended to go further than to call its provisions compacts.⁶³ Its draftsman, Nathan Dane, maintained that no provision in the constitution of a state formed within the Northwest Territory could have validity if inconsistent with the Ordinance's "compacts."⁶⁴ Webster, too, in the debate with Hayne, declared that those "compacts" were "not only deeper than all local law, but deeper, also, than all local constitutions."⁶⁵ That was good oratory, and possibly good politics, but certainly (like some other parts of Webster's great speech) poor history. As for Dane, he was defending the Ordinance as his own, against recent attacks on his claims of authorship, and good reasons will later appear for strongly doubting his intellectual honesty in that performance.⁶⁶

Theories of social compact colored the political thinking in 1787 of persons whose educational background would be comparable to that of those who read these pages. Today, a totally different intellectual atmosphere permits the acceptance of these hoary fallacies only by the educated who have read the words of social philosophers without sufficiently reflecting upon their errors. Historians offer many examples of this truth.⁶⁷ Even by 1830 progress away from them had

⁶² *Post* n. 53 of Sec. IV.

⁶³ Dane put in the compacts at the last moment; there is no evidence that the problem was considered by him or by the committee; and the facts in n. 123 *post* suggest an increasing willingness to assume that compacts could be so created.

⁶⁴ *Abridgment*. 7: 443.

⁶⁵ Webster, *Works*. 3: 264; *Writings and Speeches*, 5: 264. On John Quincy Adams compare *ante* nn. 55, 61.

⁶⁶ See *ante* n. 42.

⁶⁷ So, for example, Mr. Poole wrote in 1876: "its broad and enlightened provisions . . . were made perpetual and irrepealable . . . when new states were organized on this territory, the people were not left with the discretion of accepting or rejecting the provisions of their ordinance in their con-

been very great. In answer to this it may be said: Compact or no compact, there was a right to rely upon the word of Congress. Not, of course, in law; to assume so would contradict the Constitution's declaration that Congress shall have power (that means, at all times) "to make all needful rules and regulations" respecting the territories. The boundary disputes just mentioned did not really involve reliance by the citizens on anything. The citizens took no interest in them. They merely afford views of rampant politicians before a backdrop of the public's common sense.

The *idea* that the Ordinance's compacts were immutable and national in character was scarcely challenged before the great debate

stitutions"—*ante* n. 22, at 231. Herbert B. Adams wrote that Jefferson's idea "of a federal compact between the East and the West . . . was adopted by Congress April 23, 1784, and readopted July 13, 1787, in the so-called 'articles of compact', which . . . were 'to endure forever'"—in *The Nation* (May 4, 1882), 34: 384 col. 2. Mr. Thwaites rested the "birthrights" of Wisconsin and Michigan on the Ordinance's supposed compacts—*ante* n. 61. Francis A. Walker assumed they were realities—*The Making of the Nation, 1783-1817* (London, 1896), 39; Frederick D. Stone, in his in general highly critical article on "The Ordinance of 1787" (1889) did the same—*Pennsylvania Magazine of History and Biography*, 13: 309, at 314. Mr. Nevins accepted the Ordinance's words, stating that it "was 'a compact between the original States, and the people and States in the said territory'"—Allan Nevins, *The American States*, 597. Justin Winsor wrote of Jefferson's ordinance, "All provisions were in the nature of a compact between the new communities and the old"—*Westward Movement*, 260; and in pointing out the disregard by Congress of the supposed compact relating to boundaries, in the Ordinance of 1787, and the consequent "futility" of these, he evidently assumed them to be in fact compacts—*ibid.* 286. Even Professor G. E. Howard wrote: "The guaranties of the compact—which were to remain unalterable, unless by common consent—'fixed forever the character of the population, in the vast regions northwest of the Ohio', and, let us add, the still broader domain west of the Mississippi"—*Introduction to the Local Constitutional History of the United States* (1889), at 142. Professor Howard's quotation (continuing, "by excluding from them involuntary servitude") is from Webster, *Works*, 3: 264. The latter's statement is sound; for the Ordinance was allowed by Congress to control the territories *while such*, and their population actually adopted for the new states constitutions that continued in essentials the Ordinance's prescripts. But Howard's "domain west of the Mississippi" is less accurate, however great may have been the *influence* of that instrument on the other statutes, beginning with the Missouri Compromise, which share responsibility for trans-Mississippi developments. References to these matters in general histories are so brief that it is usually impossible to know what the writer's position is. For example, John D. Hicks, after quoting the compact provision on personal rights, enumerates some of the rights "thus solemnly guaranteed"—*The Federal Union* (1937), 182. But in what sense was there any guaranty? That is a word rarely adequately scrutinized here.

Nor have the few lawyers who have written of these matters been adequately careful. James Schouler wrote of the Ordinance as "ordaining religious freedom perpetually," and stated that it "dedicated the soil to free-

of 1820 on the Missouri Compromise, and the *practice* of treating the ostensible "compacts" as though they were actually such continued long after that debate. In the meantime Congress extended the Ordinance of 1787, in one or another sense, to new territories. In early days, before the defects of its governmental plan became apparent, it was natural to establish a government identical with or similar to that established in the Northwest Territory, except when, as in the case of Orleans Territory, the peculiarities of pre-existing laws and government made this undesirable.⁶⁸ When such extensions of the Ordinance were made, the supposedly peculiar character of its compact articles was specially recognized in provisions assuring to the inhabitants the "rights, privileges, and advantages" granted in 1787; and sometimes there were words of perpetuity. The practice of granting these rights to the inhabitants of the territories, by act merely of Congress yet seemingly as rights assumed to be of super-statutory character.⁶⁹ con-

dom forever"—*History of the United States* (rev. ed. 1894), 1: 111-12; looking, again, merely at the words anyone can read. As respects Compact Article V, although the erroneous idea that the Ordinance, itself and directly, controlled the admission of states disappeared in the main long ago, it can be found even in relatively recent constitutional treatises—J. A. Jameson, *Treatise on Constitutional Conventions* (4th ed. 1887), sec. 191. Even Judge Cooley must long have thought that they could be reconciled with judicial decisions, for he wrote in 1883: "Although it has been said . . . that the ordinance of 1787 was superseded in each of the States formed out of the Northwest Territory by the adoption of a State constitution, and admission to the Union, yet the weight of judicial authority is probably the other way"—Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* (5th ed. 1883), 34 (*p. 25) n. 2. But this was abandoned in the 6th ed. of 1890—37 n. 2.

⁶⁸ Cf. Carter, *Territorial Papers*, 9: 90 (and citations in his n. 10), 100; for Jefferson's perplexities see *ibid.* 204-5, 405-6. But even in that case, after unrestricted government of the Territory for a short time, the Ordinance was in large degree extended over it—see next note. The problems of the French settlements in Illinois are referred to *post* cclxxxvi, ccxcv-ccciv.

⁶⁹ *Restrictions* imposed upon territories were once supposed to raise no question of congressional power, which was assumed to be absolute: see *ante* cxxxix, cxliii-v. Restrictions purportedly imposed by enabling or admission acts upon new states have already been referred to—*ante* clvii *seq.* It is an ostensible guaranty of *rights* to the inhabitants of a territory that is here involved, and again there would be no question of the power of Congress to grant rights if these were subject to amendment after conferment. The difficulty is that the enactments here in question were assumed to grant irrevocable rights.

The compact governing the Southwest Territory assured it a "government . . . similar to" that of the Northwest Territory, "provided always that no regulations made or to be made by Congress shall tend to emancipate slaves"; and that Congress should "never . . . bar or deprive" the inhabitants of "any privileges" enjoyed by those of the Northwest Territory.

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tinued at least until after the Supreme Court had made clear the fact that the rights were not of such nature. This is illustrated by the act of 1848 creating Oregon Territory.⁷⁰

The cession deed also stipulated that the ceded territory should be formed "into a State or States . . . the inhabitants of *which* shall enjoy all the privileges, benefits, and advantages" of the Ordinance of 1787. That is, the guaranty was not in form to the Territory but to the state or states that should be formed therein or to the inhabitants thereof—North Carolina's act of cession, of Dec. 22, 1789, and deed of cession of Dec. 25 in Carter, *Territorial Papers*, 4: 7, 11-12; act of Congress of April 2, 1790, *ibid.* 16, or *U. S. Stat. at Large*, 1: 107.

The act creating Mississippi Territory established "a government in all respects similar" to that of the Northwest Territory with the exception and exclusion of the article excluding slavery; and provided that "from and after the establishment of said government" the Territory's inhabitants should enjoy all "the rights, privileges, and advantages" granted by that Ordinance—April 7, 1789, Carter, *Territorial Papers*, 5: 18, secs. 3 and 6; *U. S. Stat. at Large*, 1: 549. The extension of the Ordinance to the Territory, and the exception as to slavery, were both put upon the basis of a compact between the United States and Georgia by that state's subsequent act of April 24, 1802, which released to the Union all her claims to the territory upon various explicit conditions that were accepted by the United States, including the Ordinance's extension with the exception stated. Carter, *Territorial Papers*, 5: 145.

The act of March 26, 1804 which organized both the Territory of Orleans and the District of Louisiana (out of which latter Missouri Territory was created) had likewise granted their respective inhabitants specifically enumerated personal liberties, but, curiously, not identical liberties—*ibid.* 2: 283, secs. 5, 12. The extension to Orleans Territory was of "a government . . . similar . . . to that now exercised in the Mississippi territory," with the added assurance that inhabitants of the former should "enjoy all the rights, privileges, and advantages" secured by the Ordinance of 1787—Act of March 2, 1805, Carter, *Territorial Papers*, 9: 405; *U. S. Stat. at Large*, 2: 322. The act, however, despite the foregoing general words, explicitly excepted both the antislavery article and the provisions regulating the descent and distribution of decedents' estates. When Missouri Territory was created by act of June 4, 1812, various personal liberties secured by the first three compact articles of the Ordinance of 1787 were guaranteed to the inhabitants of the new Territory—*U. S. Stat. at Large*, 2: 743, sec. 14, Carter, *op. cit.* 14: 558.

Possibly because Alabama Territory was carved out of Mississippi Territory, no guaranty of right was included in the act of March 3, 1817 that created it—*U. S. Stat. at Large*, 3: 371. If such was the reason, its invalidity was recognized in other legislation, the contrary practice being followed in the acts creating Michigan Territory (out of the Northwest Territory)—Jan. 11, 1805, *ibid.* 2: 309, sec. 2; Wisconsin Territory (out of Michigan Territory, after an act of June 28, 1834 had added to the original Territory the portions of the Louisiana Purchase north of Missouri, which were too sparsely settled to be made into states—*ibid.* 4: 701)—April 20, 1836, *ibid.* 5: 10, sec. 12; Iowa (out of Wisconsin) Territory—June 12, 1838, *ibid.* 5: 235, sec. 12; and of Minnesota (out of Wisconsin) Territory—March 3, 1849, *ibid.* 9: 403, sec. 12. These acts guaranteed all the rights guaranteed by the Ordinance of 1787.

⁷⁰ The act shows that delusions still existed respecting the power of Congress both to grant irrevocable rights and impose inescapable conditions. It read: "The inhabitants of said Territory shall be entitled to enjoy all and

The basis of the practice may have been nothing more than a habit of copying one statute into another; it may have been doubts regarding the status of territories under the Constitution; or the draftsmen of such statutes may have acted on a continuing belief that the compact articles of the Ordinance of 1787 were of perpetual authority. In the light of decisions of the Supreme Court it should have become increasingly apparent that those articles were merely legislation controlling the Old Northwest while it remained a territory; and that attribution to the Ordinance of any other character involved either ignorance of judicial construction of the Constitution or inattention to such construction. The correct view of their character was, indeed, taken by some persons at a very early day.⁷¹ Per-

singular the rights, privileges, and advantages granted and secured to the people of the territory of the United States northwest of the River Ohio, by the articles of compact contained in the ordinance" of 1787, "and shall be subject to all the conditions, and restrictions, and prohibitions in said articles of compact imposed upon the people of said territory"—sec. 14 of act of Aug. 14, 1848, *U. S. Stat. at Large*, 9: 329.

⁷¹ In a memorial of March 12, 1810 to Congress, praying relaxation of the Ordinance's requirements of 60,000 inhabitants as a precondition to statehood, the legislature of Orleans Territory wrote thus: "That remedy, Legislators, is in your hands. No constitutional obstacle prevents you from using it. The condition . . . can be repealed by the same authority which has imposed it. It does not emanate from the constitution of the United States: it emanates from your will. . . . The Articles of *Compact* which are included in that ordinance cannot be considered as obligatory on us, since we stipulated, approved, accepted nothing; and the Ordinance with regard to us is a law like the others, emanating solely from your will"—Carter, *Territorial Papers*, 9: 875, 876. The Vincennes Convention of 1802 treated the slavery compact as mere legislation in asking Congress to suspend its operation for ten years; but neither the Convention nor the committees of Congress which in 1803 and 1805 reported on it ventured any word explicitly as to its nature—*Ind. Hist. Soc. Publications*, 2: 461-76.

Again the Supreme Court of the United States, in *Menard v. Aspasia* (1831), 30 U.S. (5 Pet.) 505, at 515, had declared of various compacts of the Ordinance: "These . . . were designed to secure the rights of the people of the territory, as a basis of future legislation [by Congress], and to have that moral and political influence that arises from a solemn recognition of principles, which lie at the foundation of our institutions" (my italics). Unfortunately, however, the Court had on the same page called the anti-slavery article a "compact . . . formed between the original states, and the people of the territory."

In his opinion in the *Dred Scott* case, Justice McLean put the re-enacted ordinance of 1789 for the Northwest Territory on an exact equality with later extensions of it to other territories. "It rested for its validity," said he, "on the act of Congress, the same, in my opinion, as the Missouri Compromise"—60 U.S. at 547. As respects any prohibition or sanction of slavery this is quite correct. As respected the right to govern and the duty to nurture republican states, two sources of power underlay the Ordinance as respects the Northwest Territory, and only one (the Constitution) in all other cases.

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haps for that reason to some extent, but undoubtedly for the primary reason that the generality and simplicity of the Ordinance became increasingly inconsistent with a tendency toward elaborately detailed legislation, the practice of "extending" its provisions was abandoned, and a practice adopted—certainly very beneficially, although to an inadequate extent—of establishing by specific governmental provisions a government adapted to the actual circumstances of each territory.⁷²

The practice of Congress in regard to *specific* compacts of the Ordinance may now be briefly considered, as a basis for an understanding of the quotations which follow from opinions of the Supreme Court. In part that practice was consistent and in part it was inconsistent with an assumption that the Ordinance's compacts had an authority above ordinary legislation.

As an example of practice of the former character consider the compact that navigable streams emptying into the Mississippi and St. Lawrence should forever remain common highways, free to the inhabitants of the Territory and to citizens of the United States and future states "without any tax, impost or duty therefor."⁷³ The introduction of this "compact" into the Ordinance was without basis in the terms of Virginia's cession. In consequence of this fact, Virginia, in the statute by which she agreed to the admission of Kentucky as a state, made it a condition of her consent to the admission⁷⁴ that all future states bordering on the north shore of the Ohio River should enjoy free navigation thereof and concurrent jurisdiction thereover.⁷⁵ Nothing permanent, of course, resulted from her act; at the most she received as her *quid pro quo* a promise by *that* Congress; for it alone—and not other states—bargained with her. However, faith would be kept in such a case, and as a matter of legislative policy, Congress thereafter began to insert similar provisions in various statutes. One of these was merely an act providing for the sale of public lands in

⁷² The vast change in the form of statutes under which territories were organized can be seen by comparing the Ordinance with the act organizing Oklahoma—May 2, 1890, *U. S. Stat. at Large*, 26: 81-100.

⁷³ Carter, *Territorial Papers*, 2: 48. The same provision was made respecting "the carrying places between" those rivers. In the *Wis. Law Rev.* (1939), 547-62, there is a discussion of the meaning of the Ordinance's clause, with particular reference to carrying-places, by Mr. Effland. See especially pp. 553-55, 556 for statements of the legal problems involved.

⁷⁴ Since Kentucky was part of Virginia, the latter's consent was required by the Constitution, Art. IV, sec. 3.

⁷⁵ Sec. 11 of act of Dec. 18, 1789—Hening, *Statutes*, 13: 19-20.

the Northwest Territory.⁷⁶ The others—in which the stipulation more perplexingly simulated a super-legislative nature—were enabling acts under which were organized states that had navigable streams within or on their borders. In the case of the Mississippi River the provision seemed so important that it was inserted both in Louisiana's enabling act and in the act declaring her admission to the Union.⁷⁷ Essentially the same procedure was followed with Minnesota, admitted in 1858.⁷⁸

Thus, although President Monroe's cabinet was clear on the question in 1820,⁷⁹ Congress was not. Nor were the lower courts. To some it appeared (correctly) that admission on an equality with the original states must necessarily have relieved the states created in the Northwest Territory from the obligations imposed upon them before admission. On the other hand, in some early cases, both state and federal, it was not only held that the obligation of the navigation clause survived attainment of statehood, but assumed in the language of the courts that the continuing force of the provision was due to its compact character.⁸⁰

It had come to be recognized, indeed, that not only were those compacts which duplicated provisions of the federal Constitution thereby superseded, but also *some* of the others. In particular, the change

⁷⁶ Act of May 18, 1796—*U. S. Stat. at Large*, 1: 468.

⁷⁷ *Ibid.* 2: 701.

⁷⁸ It was inserted, namely, in both the act of March 3, 1849, creating the Territory and in the enabling act of Feb. 26, 1857, with no explicit reference in the act of admission (which, however, accepted the state as having complied with the enabling act)—*U. S. Stat. at Large*. 9: 403, sec. 2; *ibid.* 11: 285. The same condition respecting navigable waters is found in the enabling acts of Mississippi, March 1, 1817, *ibid.* 3: 348, sec. 4; Alabama, March 2, 1819, *ibid.* 3: 489, sec. 6; Wisconsin, Aug. 6, 1846, *ibid.* 9: 57, sec. 3. Likewise in the admission acts of California, Sept. 9, 1850, *ibid.* 9: 452, sec. 3; Oregon, Feb. 14, 1859, *ibid.* 11: 383, sec. 2. Very likely there were other cases.

⁷⁹ *Ante* at notecall 55.

⁸⁰ *Hogg v. Zanesville Canal & Mfg. Co.* (1832), 5 Ohio Rep. 410. "It is a right of which they [the people of Ohio] cannot be deprived unless by agreement between the people of the United States, through their representatives in congress, and the people of Ohio, through their representatives in the general assembly"—*ibid.* 422. "While . . . some of the articles of compact in that ordinance have been superseded by the admission of the States within the North Western Territory into the Federal Union, it has been held by repeated judicial decisions, that the solemn guaranty referred to"—namely, of free navigation—"is still in force, and is a perpetual inhibition to such States from authorizing any impediments or obstruction to the free navigation of the water-courses within its scope"—*Jolly v. Terre Haute Co.* (1853), 6 McLean 237, 241; citing *Spooner v. McConnell* (1838), 1 McLean 337, *Palmer v. Commissioners of Cuyahoga Co.* (1843), 3 *ibid.* 226, and *Hogg v. Zanesville Canal & Mfg. Co., ante*.

from territorial to state government "necessarily abolished," said Justice McLean on circuit, not only provisions for temporary governmental organization but "also such parts as were designed to produce a certain moral and political effect. Of the latter description were those provisions which secured the rights of conscience, which declared that education should be encouraged, that excessive bail should not be required &c. . . . And it may be admitted that any provision in the constitution of the state, must annul any repugnant provision contained in the ordinance. This is within the terms of the ordinance. The people of the state formed the constitution, and it was sanctioned by Congress; so that there was the 'common consent', required by the compact to alter or annul it."⁸¹

The propositions were sound, and under the present Constitution the reason may stand, even had compacts existed to which, when made, "the original states" were parties. The writer has already attempted to give an explanation of this. No explanation was ever given by the judges who occasionally spoke of the subject and the explanation offered has no judicial authority to support it. It has been pointed out, however, that it was assumed from the beginning that such action by Congress was sufficient, and it seems likely that legal justification for the practice must sometime have been formulated.⁸² But since no compacts were in fact involved, the matter is of no practical significance.

It was a completely open question at that time (1838) whether the legislative powers of Congress in a territory were unrestricted by the provisions of the bill-of-rights amendments to the Constitution, respecting the personal liberties referred to in the quotation in the preceding paragraph.⁸³ As respects the proposition in the last of the

⁸¹ *Spooner v. McConnell* (1838), 1 McLean at 342-43.

⁸² Compare also these later remarks by Chief Justice Dixon: "the adoption of the constitution of this state, by the free will and vote of the people with the assent of *the government of the United States*, and the subsequent admission of the state into the Union . . . abrogates entirely the provision of the ordinance wherever its provisions and those of the state constitution come in conflict"—*The Conn. Mut. Life Ins. Co. v. Cross* (1864), 18 Wis. 109, 115; italics added. See also remarks of Justices McLean and Catron in *Strader v. Graham* (1850), 51 U. S. (10 How.) 97, 98.

⁸³ Such liberties, when given by Congress to inhabitants of a territory are merely matters of internal government of the territory, while such. For an early decision to this effect by a state court see *Conn. Mut. Life Ins. Co. v. Cross* (1864), 18 Wis. 109, 115—jury trial. A dictum to the same effect, regarding jury trial in Iowa (which was not part of the Northwest Terri-

quotation, Justice McLean did not apply it to the free-navigation and the antislavery clauses. There being nothing in these, he said, repugnant to equality of the states, and nothing in the constitution of Ohio repugnant to those clauses, they were still "in full force," and alterable only by joint action of Congress and the state legislature.⁸⁴ The proposition that a provision of a state constitution, if inconsistent with a provision of the Ordinance, would nullify this, was slightly too broad. As to this excess, only, it was erroneous, as will be pointed out below.⁸⁵

Ultimately, in 1845, it was held by the Supreme Court of the United States that a stipulation in the enabling act for Alabama regarding its navigable waters (in words similar to those of the Ordinance of 1787)—notwithstanding that it was in the strict form of a compact, and one ostensibly imposed in consideration of public lands granted to the state⁸⁶—was no more than an exercise by Congress of its power to regulate interstate commerce.⁸⁷ The case required considera-

tory, the provision being borrowed from the Ordinance) is to be found in *Hawkins v. Bleakly* (1916), 243 U.S. 210, at 217-18. See also *Cincinnati v. Louisville & Nashville R. R. Co.* (1911), 223 U.S. 390, at 401 *seq.* on the power of eminent domain as stated in the Ordinance of 1787.

⁸⁴ *Spooner v. McConnell*, *ante* n. 80, 343 *seq.*, particularly at 349, 351. The discussion is of the navigation clause but recognizes that the antislavery article is subject to the same reason. Justice McLean's view, of course, is inconsistent with the facts (1) that mere repetitions of the Constitution in statutes have no more legal force than quotations of them in these pages, and (2) that practically speaking—*ante* cxcix-cciii—the supposed continuing compact had no reality.

⁸⁵ A glimmer of the true test of the temporary or continuing force of the Ordinance's various provisions obtruded into the compact phraseology of the Spooner case, and became a little brighter in another case decided by Justice McLean a few years later. In the Spooner case he said: "What legislative power Congress may exercise over these rivers, under the power to regulate commerce among the several states, it does not seem necessary now to determine. Any law on this subject"—passed under that power—"must be general in its provisions and consequently apply to all the States"—1 McLean at 354. Legislation respecting particular rivers could not be "general," nor good, therefore, under that power. The authority of the rules-and-regulations clause, however, covers such particularities; and the Ordinance clause did protect the rights of citizens of all states in conformity to the Constitution's requirement, by Art. IV, sec. 2, sub-sec. 1. Five years later he said: "A state, by virtue of its sovereignty may exercise certain rights over its navigable waters, *subject, however, to the paramount power in congress to regulate commerce among the several states*"—*Palmer v. Commissioners of Cuyahoga Co.*, *ante* n. 80, at 227 (*italics added*).

⁸⁶ See *ante* clxi.

⁸⁷ *Pollard's Lessee v. Hagan* (1845) 44 U.S. (3 How.) 212, at 229. Congress may, in admitting a new state, require as a condition what amounts to a regulation of interstate commerce, or of commerce with the Indian

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tion of the extent and nature of the rights of the United States within the several states, and therefore of the nature of its rights in the public lands held therein, and also of the question whether its rights could be in anywise affected by compacts made by Congress with new states when admitted to the Union.^{ss} Upon these matters the Court, in *Pollard's Lessee v. Hagan* (1845), spoke as follows:

Taking the legislative Acts of the United States, and the States of Virginia and Georgia, and their deeds of cession to the United States, and giving to each, separately, and to all jointly, a fair interpretation, we must come to the conclusion that it was the intention of the parties to invest the United States with the eminent domain of the country ceded, both national and municipal, for the purposes of temporary government, and to hold it in trust for the performance of the stipulations and conditions expressed in the deeds of cession and the legislative acts connected with them. . . . When the U. S. accepted the cession . . . they took upon themselves the trust to hold the municipal eminent domain for the new states, and to invest them with it, to the same extent, in all respects, that it was held by the states ceding the territory. . . .

When Alabama was admitted into the Union . . . Nothing remained in the United States, according to the terms of the agreement, but the public lands. . . . The object of all the parties to these contracts of cession, was to convert the land into money for the payment of the debt, [that is, "the public debt, incurred by the war of the Revolution"] and to erect new states over the territory thus ceded. . . .

Whenever the United States shall have fully executed these trusts,

tribes, etc. "But in any case such legislation would derive its force . . . solely because the power of Congress extended to the subject, and, therefore, would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress. *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1; *Pollard v. Hagan*, 3 How. 212"—*Coyle v. Smith* (1910), 221 U.S. 559, 574; see *ante* clxii-iii. Compare *ex parte Webb* (1911), 225 U. S. 663, 690.

^{ss} The case was ejectment for a Mobile lot. Plaintiff's title rested on a government patent and the statute under which that was issued. The jury was charged that even if the premises were below usual high-water mark the United States patent and statute gave him no title. Verdict and judgment being for the defendant, and judgment affirmed in the Supreme Court of Alabama, the case went to the federal Supreme Court on the question whether the instruction stated was correct; and this was answered affirmatively.

The enabling act of March 2, 1819 under which Alabama was organized as a state, cited *ante* n. 78, contained a stipulation regarding navigable streams almost identical with that of the Ordinance of 1787. Query, whether by virtue of this the United States had any special rights to the shores of or soil under navigable streams? Affirming the holding of the *Pollard* case that it had none, cf. *Knight v. U. S. Land Assoc.* (1891), 142 U.S. 161, 183

the municipal sovereignty of the new States will be complete, throughout their respective borders, and they, and the original states, will be upon equal footing, in all respects whatever. We, therefore, think the United States hold the public lands within the new states by force of the deeds of cession, and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess, or have reserved by compact with the new states for that particular purpose. . . .

Then to Alabama belong the navigable waters and soils under them . . . subject to the rights surrendered by the Constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge those rights. . . .

The declaration . . . contained in the compact entered into between them [the United States and Alabama] when Alabama was admitted into the union . . . is a mere regulation of commerce among the several states, according to the Constitution, and, therefore, as binding on the other states as Alabama. . . . This right of eminent domain over the shores and soils under the navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and soils under the navigable waters . . . might . . . deprive the states of the power to exercise a numerous and important class of police powers.⁸⁹

The first point really settled judicially was that there was no compact, no contract, in the Ordinance which bound the inhabitants of the Territory after their admission as a state. This has often been repeated by the Supreme Court.⁹⁰ The Court has frequently spoken—in cases in which the decision, and even other parts of the opinion, were pointedly to the contrary—as though *nothing* remained of the

⁸⁹ 44 U.S. at 222, 223, 224, 229, 230. Accord: *Shively v. Bowlby* (1893), 152 U.S. 1; *McGilora v. Ross* (1909), 215 U.S. 70. This doctrine that the state alone has property in the land under navigable waters in the sense that Congress cannot convey or control *title* thereto, does not exhaust the question of national control. See *Van Brocklin v. State of Tennessee* (1886), 117 U.S. 151, 167-69.

⁹⁰ "There was no contract in the fourth article of the Ordinance of 1787 respecting the freedom of . . . navigable waters . . . which bound the people of the territory, or of any portion of it, when subsequently formed into a State and admitted into the Union. . . . Yet from the very conditions on which the States formed out of that territory were admitted into the Union, the provisions of the Ordinance became inoperative except as adopted by them. All the States thus formed were . . . 'admitted into the Union on an equal footing with the original States in all respects whatever'"—Justice Field, in *Sands v. Manistee Riv. Imp. Co.* (1887), 123 U.S. 288, 295-96.

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Ordinance after admission of a state.⁹¹ This is subject to a slight exception. "To the extent that it pertained to internal affairs" of the Northwest Territory—that is, to the Territory strictly as such: its temporary frame of government, the political and personal rights of its inhabitants thereunder—"the Ordinance of 1787—notwithstanding its contractual form—was . . . superseded by the admission of Illinois into the Union 'on an equal footing with the original States in all respects whatever'. . . . But, so far as it established public rights of highway in navigable waters capable of bearing commerce from State to State, it did not regulate internal affairs alone, and was no more capable of repeal by one of the States than any other regulation of interstate commerce enacted by Congress."⁹²

⁹¹ As in the passage in the preceding note. In another opinion Justice Field said: The Ordinance "could not control the authority and powers of the State after her admission. Whatever the limitations upon her powers as a government whilst in a territorial condition, whether from the Ordinance or [!] the legislation of Congress, it ceased to have any operative effect, except as voluntarily adopted by her after she became a State of the Union"—*Escanaba Co. v. Chicago* (1882), 107 U.S. 678, 688. Similarly, Justice Gray wrote: "the Ordinance of 1787, like all acts of Congress for the government of the Territories, had no force in any State after its admission into the Union under the Constitution. *Permoli v. First Municipality of New Orleans*, 3 How. 589, 610; *Strader v. Graham*, 10 How. 82"—*Van Brocklin v. Tennessee* (1886), *ante* n. 89, at 159. And Justice Bradley wrote: "This court has held that when any new State was admitted into the Union from the Northwest Territory, the Ordinance in question ceased to have any operative force in limiting its powers of legislation as compared with those of the original States"—*Willamette Bridge Co. v. Hatch* (1887), 125 U.S. 1, 9. These are only examples.

⁹² *Economy Light Co. v. United States* (1920), 256 U.S. 113, 120—citing *Permoli v. First Municipality* (1845), 44 U.S. 589; *Van Brocklin v. Tennessee*, *ante* n. 89; *Hawkins v. Bleakly* (1916), 243 U.S. 210, 217.

Even so, it still remained to fix the meaning of the guaranty that the navigable waters of the Territory should be "forever free," equally to the inhabitants of the Territory and to the citizens of all states then existing and thereafter created, "without any tax, impost or duty therefor." In a long line of cases it was gradually established that the only absolute prohibition is that respecting taxes—see especially *Cardwell v. Amer. Bridge Co.* (1884), 113 U.S. 205, 212; in other words, "political" restrictions. The Court early declared: "It cannot be imputed to Congress that they ever designed to forbid, or to withhold from the State of Mississippi, the power of improving the interior of that State, by means either of roads or canals, or by regulating the rivers within its territorial limits, although a plan of improvement . . . might . . . affect the course or flow of rivers"—*Withers v. Buckley* (1857), 61 U.S. (20 How.) 84, 93. Over the construction of dams, bridges, etc. the states therefore retain authority, and they may create partial obstructions without violating the Ordinance or similar later statutes so long as such obstructions are in substance internal improvements authorized under the police power of the state. *Withers v. Buckley*, *ante*; *Pound v. Turck* (1877), 95 U.S. 459; *Escanaba Co. v. Chicago*, *ante* n. 91; *Cardwell*

The law, then, is that—after eliminating provisions which could apply only to the government of the Territory as such and lost force with its termination, and disregarding provisions that duplicated clauses of the Constitution but never had (after its adoption) independent force—some other portions had enduring force, and would have been superior even to conflicting provisions in the constitutions of states created from that Territory. But this was not because compacts were involved, but only because constitutional legislation by Congress was involved. Enactments of Congress concerning a territory, as such, are supported by the rules-and-regulations clause. But if unchanged when a territory becomes a state they may survive as enactments under other powers given to Congress by the Constitution—as the navigation clause of the Ordinance fell under the interstate-commerce clause; provided they are also consonant with all other requirements of the Constitution—as the navigation clause was consonant with its privileges-and-immunities requirement. The *form* of congressional action is of no importance.⁹³ Of course, too, all that is said above of the effect of the original Ordinance as re-enacted in 1789 is equally true of “extensions” of that enactment made to other territories, and most of the cases cited in the notes involved these other territories.

The legislative history, in later acts of Congress, of the Ordinance article guaranteeing freedom of religion need not be stated in detail. In a case decided by the Supreme Court in the same year (1845) as the Pollard case, above quoted, the question presented was whether the Supreme Court had jurisdiction to consider whether a city ordinance of New Orleans had impaired religious liberty.⁹⁴

v. Amer. Bridge Co., *ante*; *Hamilton v. Vicksburg R. R. Co.* (1886), 119 U.S. 280; *Sands v. Manistee Riv. Imp. Co.* (1887), *ante* n. 90; *Willamette Iron Bridge Co. v. Hatch* (1887), *ante* n. 91. And until Congress acts the states have plenarv powers of legislation, as various of the preceding cases hold.

⁹³ For example, in the Cardwell case, the Willamette case, and the Withers case the restriction was imposed in acts which, respectively, admitted California, Oregon, and Mississippi to the Union.

⁹⁴ “The ordinances complained of,” said the Court, “must violate the Constitution or laws of the United States, or some authority exercised under them; if they do not, we have no power . . . to interfere. The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect upon the states. We must therefore look beyond the Constitution for the laws that are supposed to be violated, and on which our jurisdiction can be founded”—*Permoli v. First Municipality of New Orleans*

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As a basis for its decision, which disclaimed jurisdiction, it was necessary to inquire (a) whether provisions of the Ordinance of 1787 that were extended to Orleans Territory by an act of 1805⁹⁵ had any independent force as federal law in Louisiana after adoption of its constitution in 1812—for, if they had, jurisdiction might be based thereon; and (b), as in the Pollard case, whether any basis for jurisdiction could be found in the relation of the United States to the public lands reserved in that state by the enabling act of Congress under which it was admitted to the Union. The acts of Congress, in addition to the Ordinance, which required examination were two. That of February 20, 1811⁹⁶ authorized the people of the Territory of Orleans to form a constitutional convention, including a requirement that the constitution should contain the fundamental principles of civil and religious liberty. By another act of April 8, 1812⁹⁷ Louisiana was admitted according to the mode prescribed by the act of 1811. Thus, having accepted the constitution and admitted the state “on an equal footing with the original states in all respects whatever,” nothing of those statutes could survive as a federal law whose violation could be a basis for jurisdiction. On the Ordinance the Court spoke as follows:

The principal stress of the argument for the plaintiff in error proceeded on the Ordinance of 1787. . . . In the Ordinance, there are terms of compact declared to be thereby established, between the original states, and the people in the states afterwards to be formed north-west of the Ohio, unalterable, unless by common consent—one of which stipulations is, that “no person demeaning himself in a peaceable manner, shall ever be molested on account of his mode of worship, or reli-

(1845), 44 U.S. (3 How.) 589, at 609. This is the leading case for the point that the Constitution places no inhibitions on the states in their control of religious liberties. See *Ohio v. Dollison* (1903), 194 U.S. 447; *Bolln v. Nebraska* (1899), 176 U.S. 87; *Brown v. New Jersey* (1899), 175 U.S. 174; *Spies v. Illinois* (1887), 123 U.S. 131.

Sixteen states were purportedly restrained, in enabling or in admission acts, from interfering with religious liberty. Religious freedom is not a privilege of United States citizens by force of the First Amendment, and it is therefore not protected as such under the privileges-and-immunities clause of the Fourteenth Amendment. See *U. S. v. Cruikshank* (1875), 92 U. S. 542; *Slaughterhouse Cases* (1872), 183 U.S. (16 Wall.) 36, at 74; *Duncan v. Missouri* (1893), 152 U.S. 377, at 382.

⁹⁵ Of March 2, 1805—*U. S. Stat. at Large*, 2: 322, sec. 1; *Carter, Territorial Papers*, 9: 405.

⁹⁶ *U. S. Stat. at Large*, 2: 641

⁹⁷ *Ibid.* 701.

gious sentiments, in the said territory". For this provision is claimed the sanction of an unalterable law of Congress; and it is insisted the city ordinances above have violated it; and what the force of the ordinance is north of the Ohio, we do not say, as it is unnecessary for the purposes of this case. But as regards the state of Louisiana, it had no further force, after the adoption of the state constitution, than other acts of Congress organizing, in part, the territorial government of Orleans, and standing in connection with the ordinance of 1787. So far as they conferred political rights, and secured civil and religious liberties, (which are political rights,) the laws of Congress were all superseded by the state constitution; nor is any part of them in force, unless they were adopted by the constitution of Louisiana, as laws of the state. . . . It follows, no repugnance could arise between the Ordinance of 1787 and an act of the legislature of Louisiana, or a city regulation founded on such act; and therefore this court has no jurisdiction on the last ground assumed, more than on the preceding ones. In our judgment, the question presented by the record is exclusively of state cognizance, and . . . the writ of error must be dismissed.⁹⁸

So much for illustrations of congressional action seemingly, but only seemingly, consistent with the idea that Congress could make compacts of immutable character. Along with the practice just discussed there existed from the beginning practices that were plainly irreconcilable with that idea, and sometimes *the same enactment* contained an implicit declaration of immutability, in general, alongside particular provisions inconsistent with that quality. For example, the enabling act of Indiana contained the condition that its constitution should not be "repugnant to those articles of the Ordinance" of 1787 "which are declared to be irrevocable between the original states and the people and states of the Territory northwest of the river Ohio; *excepting*" the boundary provisions set by that instrument for states to be formed from said Territory.⁹⁹ The enabling act under which Illinois became a state simply required conformity "to the ordinance," with the same exception.¹⁰⁰

It has been seen that when departures had been earlier made from the terms of the compacts with Virginia and Georgia, validation of such violations had been sought from those states, and that their legis-

⁹⁸ *Permoli v. First Municipality of New Orleans*, 44 U.S. 589, at 610.

⁹⁹ Act of April 19, 1816—*U. S. Stat. at Large*, 3: 289.

¹⁰⁰ Act of April 18, 1818, sec. 4—*ibid.*, 3: 428. Some readers will doubtless feel that there was not, in these cases, any implicit general declaration of immutability. If not, such enactments are merely more unqualifiedly contradictory of that quality.

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latures had sought to grant such validation, though their acts were of decidedly doubtful efficacy (particularly after 1789) to create obligations binding the states. And in another case in which a provision of the Ordinance had no basis in Virginia's compact with the Confederation (though as legislation and in form it met her desires) she tried to give it compact character by imposing (again, merely by act of her legislature) a condition to that effect upon her consent to action by Congress on another matter, as to which her consent was indispensable to the validity of congressional action.¹⁰¹

Because of the controversy over slavery that arose in different portions of the Old Northwest, and was particularly violent in Illinois, the question whether the Ordinance had permanent or only transitory force received attention, primarily, in connection with its antislavery article. Consideration of that question has ranged over an unnecessarily wide field. It has not infrequently been stated that property in general or property in slaves was recognized or guaranteed by the treaties of 1763 and 1783, in the sense (shown by the context) that titles thereto were permanently assured or guaranteed. These statements are wholly erroneous. As regards the Northwest Territory there would probably be no need, in this connection, to consider either the provisions of the treaty of 1763, or the actions of General Clark during the conquest of the Illinois Country, or the provisions of the Virginia statute which thereafter established the County of Illinois. Anything in the treaty that was inconsistent with Virginia's later legislation before her cession of land and jurisdiction to the Confederation, or with subsequent legislation of the latter, would seemingly have been overridden (no matter whether wrongly) by such legislation. And anything in the legislation of the new Congress that was inconsistent with Virginia's legislation would have overridden the latter, *unless* the former violated the cession compacts that have repeatedly been stated as consummated by Virginia's cession. But, those propositions aside, as a matter of fact nothing in the treaty of 1763 had any bearing on the problem.

¹⁰¹ See *ante* at notecalls 33, 38, 61 for situations of the first type, and at notecall 74 for an instance of the second type.

In all the cases here in question action by Congress was assumed to constitute consent by "the original states" if it was understood that a compact was being altered—as the language used (indicating exceptions) would indicate; and action by Virginia's legislature was assumed to bind Virginia.

By the treaty of 1763 (article 4) Great Britain agreed that French subjects might "retire, with all safety and freedom, wherever they shall think proper, and may sell their *estates*, provided it be to subjects of his Britannic Majesty, and bring away their *effects*, without being restrained, under any pretence whatsoever, except that of debts. or of criminal prosecutions." General Gage's proclamation gave literal effect to these provisions.¹⁰² Here was no continuing guaranty of anything, merely safe withdrawal with personal property and restricted liberty to sell landed property *presently owned*; no guaranty for the future as to either. It would seem impossible that anybody could read the treaty and imagine that it did more than guard against spoliation at the time of transfer of sovereignty. Historians have nevertheless very generally misconstrued it.¹⁰³ Such provisions have a long history in international relations. They represent a stage in the history of war.

Until down into the eighteenth century there was a general prevalence of the doctrine that war is conducted not merely against an enemy state and its armed forces but also against its citizens. . . . The principle also prevailed that law was properly self-supporting; a conquering power took whatever it desired out of a country occupied by its military forces. . . . The idea that war is conducted solely against an enemy state and its armed forces, not against its peaceful citizens, attained dominance in Europe only in the eighteenth century. Of decisive influence in establishing it were the oft-quoted words of Jean Jacques Rousseau. . . .¹⁰⁴ After his memorable pronouncement the

¹⁰² Dec. 30, 1764, *American State Papers, Public Lands*, 2: 209; *Illinois Historical Collections*, 10: 395.

¹⁰³ Hinsdale wrote: "The capitulation of 1760 and the treaty of 1763 guaranteed the full protection of all the property of the people who were transferred"—*Old Northwest*, 348; and his context shows he understood this to be a general guaranty. Similarly, Justin Winsor wrote that "There were four or five thousand French and half-breeds in the Illinois country, whose rights of property had been guaranteed in the treaties of 1763 and 1782, and human servitude prevailed among them"—*Westward Movement*, 288. For this statement there is no basis whatever. Clarence Alvord wrote that "the Illinois people were protected in their land titles by the treaty of peace of 1763,"—qualifiedly, yes, as respected sale to British subjects only of what they then owned, but nothing more—"that of 1783,"—not at all (there was nothing in the treaty remotely suggestive of the subject)—"and by the cession of Virginia in 1784"—*The Illinois Country, 1673-1818* (1920), 417 n. The writer was himself guilty in an earlier volume of repeating the error he is now correcting, and failed to *remove* it, though correcting it a few pages later—Philbrick, *Laws of Indiana Territory (I.H.C. 21)*, xxxv and n. 4; the statement on xxiii is incorrect; and as to that on xxxv see *post* n. 116.

¹⁰⁴ "La guerre n'est donc point une relation d' homme à homme, mais

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complete immunity of private property became a firm principle in the law of war on land.¹⁰⁵

In the transitional period while the humaner principle was gaining dominance treaties frequently provided that conquered subjects might remain, and in continued enjoyment of their property, during good behavior, or allowed them a reasonable time to remove after the sale of their property. Such treaties were very numerous; that of 1763 and Jay's Treaty were merely illustrations of this humane practice.¹⁰⁶ To this principle of the inviolability of private property our government has, of course, been committed throughout our history.¹⁰⁷ But there was nothing in these principles or in the treaty of 1763 that could in any way constrain the United States in subsequently denying to all residents of the Northwest, if it so desired, the right to hold slaves. As for the treaty of 1783, it contained nothing whatever pertinent to the question before us.

Ignoring, therefore, the treaties of 1763 and 1783—both often referred to in this connection—we have only to consider the acts of

une relation d'état à état dans laquelle les particuliers ne sont ennemis qu'accidentellement, non point comme hommes, ni même comme citoyens, mais comme soldats. . . . Enfin, chaque état ne peut avoir pour ennemi que d'autres états, et non pas des hommes"—*Du Contrat Social* (Edm. Dreyfus-Brissac, ed., Paris, 1896), Bk. I, ch. 4.

¹⁰⁵ Franz Scholz, *Privateigentum im besetzten und unbesetzten Feindesland* (1919), 15-16. "The Hague Regulations . . . declare private property on hostile territory inviolate. This is merely a repetition of maxims which, though often disregarded in practice, had long become firmly established in international law"—A. Latifi, *Effects of War on Property* (1909), 29; compare 60. "Even Bynkershoek and Wolf . . . at the commencement of the eighteenth century, assert the broad principle, that everything done against an enemy is lawful. . . . Such, however, was not the sentiment and practice of enlightened Europe at the period when they wrote"—Henry Wheaton, *History of the Law of Nations* (8th Eng. ed. by Keith, 1939), 707.

¹⁰⁶ In T. D. Woolsey, *Introduction to International Law* (5th ed. 1918), sec. 123, note the reference to the long list compiled by W. O. Manning in his *Commentaries on the Law of Nations* (1839). Wheaton dated "the modern law of nations" from the treaty of 1763—*op. cit.* (1st ed. 1845), 269; he said nothing, however, of the treatment of private enemy property in war on land. The practice of allowing time to sell property and remove the proceeds is still regular in the treatment of nonresident aliens who take title to property (particularly land) from nationals by inheritance or devise—see C. C. Hyde, *International Law. Chiefly as Interpreted by the United States* (2d ed. 1945), 1: 652 at notecalls 9-12.

¹⁰⁷ "The modern usage of nations . . . would be violated . . . if private property should be generally confiscated, and private rights annulled. The people change their allegiance; . . . but . . . their rights of property, remain undisturbed"—*U. S. v. Percheman* (1833), 7 Pet. (33 U.S.) 51, 86-87, per Marshall, Ch. J.

Virginia and of the Confederation. And what Virginia did before she deeded the Old Northwest to the Confederation on March 1, 1784 is of interest only as throwing light on the meaning of that conveyance.¹⁰⁸

That deed recited that the soil and jurisdiction were transferred subject to stated *conditions*, one of them being: "That the French and Canadian inhabitants, and other settlers of the Kaskaskies, St. Vincents, and the neighbouring villages who have professed themselves citizens of Virginia, shall have their possessions and titles confirmed to them, and be protected in the enjoyment of their rights and liberties." This condition was accepted by Congress.¹⁰⁹ It was therefore a compact in the strict sense, but there was no provision in the compact that it should be alterable by joint consent only, or that common consent might be manifested in a particular manner only. Two questions arise regarding it.

The first question is: In the absence of extrinsic evidence of the parties' intent, what meaning should be given to this provision? A great number of somewhat similar provisions have occurred in treaties. They have not been treated as contradicting either of two basic principles: the first, that when political jurisdiction over a territory passes from one sovereignty to another the existing laws for the protection of property continue in force until modified by the new sovereign; and, secondly, that that sovereign, save in so far as explicitly bound to the contrary, has full power to determine the rights of its nationals, and *a fortiori* of resident aliens, to hold as property anything within its boundaries; and the power to fix the mode of acquiring and transferring rights therein. Such a provision, therefore, as the condition in Virginia's deed could not properly be construed as meaning that the guaranteeing power could never in the future alter

¹⁰⁸ Governor Henry's secret instructions to Clark of Jan. 2, 1778 were, that the loyal "be treated as fellow Citizens, & their persons & property be duly secured"—J. A. James, *George Rogers Clark Papers, 1771-1781* (I.H.C. 8), 34. Clark's proclamation to the residents of Vincennes (and doubtless his assurances to those of Kaskaskia) were to the same effect—*ibid.* 52. And Virginia's statute of Dec. 9, 1778, which followed the conquest and created the County of Illinois, assured the inhabitants freedom of "religion, which the inhabitants shall fully, and to all intents and purposes enjoy, together with all their civil rights and property"—Hening, *Statutes*, 9: 553. Could anyone reasonably contend that here was a guaranty that they should continue to enjoy indefinitely thereafter their "civil rights and property" *unchanged* by Virginia legislation?—any more than that they should continue to enjoy their religion as it then was?

¹⁰⁹ *Jour. Cont. Cong.* 26: 114, 25: 560, 562. See *ante* n. 31.

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the content of the property rights so recognized. It would seem, aside from authority, impossible to assume that the right guaranteed calls for any greater protection than that which would be accorded to property of a similar kind, owned at the same place and time by citizens of the guaranteeing power. This practice was perfectly expressed in the treaty for the purchase of Louisiana from France: "The inhabitants shall be . . . admitted as soon as possible . . . to the enjoyment of all the rights . . . of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess."¹¹⁰ If a country has the right to deny to its own citizens all individual property right in coal lands, or in gold, or in slaves—could it conceivably be held, *unless* by a provision most clear and explicit, to have deprived itself of that power as respects such property owned by aliens? The Supreme Court of the United States gave a negative answer to that question in construing a provision very similar to that in the Ordinance in a treaty of the Confederation era relating to residents of continuing alien status.¹¹¹ The basis of this view is, in fact, mere common sense. There is no authority to the contrary.

The situation of the French inhabitants of Illinois and Louisiana was different in that they were about to become citizens. Becoming

¹¹⁰ Art. 30. But nothing can be so plain as to be safe against partisan interpretation. See Justice Catron's argument in the Dred Scott case—*ante* n. 239, Sec. II. As other judges pointed out, all of Louisiana where slaves were held in 1803 had long before the decision of that case (1857) been organized into states already in the Union, and the inhabitants owning slaves in 1803 had been protected in their enjoyment of such property. But that no requirement of that protection had actually been intended seems clear. At all events, even if restriction of the power of Congress was intended, and had the treaty been violated, the statute would have been valid. See the opinions of Justices McLean and Curtis—60 U.S. at 557, 630-33.

The treaty of 1819 with Spain (art. 6) omitted the provision following the semicolon in the above quotation.

¹¹¹ *Todok v. Union State Bank* (1930), 281 U.S. 449. In a treaty of 1783 with Sweden it was provided that the subjects of each power in the territory of the other might freely dispose of their "goods and effects" (here construed to include land) as they should desire. Homesteads were later created by Nebraska law, and the joinder of husband and wife was required for their conveyance. Held, not a violation of the treaty. "It is not to be supposed that the treaty intended to secure the right of disposition in any manner whatever regardless of reasonable regulations in accordance with the property law of the country of location, bearing upon aliens and citizens alike"—*ibid.* 455. Compare *post* n. 140.

The guaranty ("saving") to the French inhabitants of the Illinois Country, as an *exception*, of their local law of descent and conveyance was stronger than that involved in the treaty with Sweden.

such, their legal position would have been strengthened had there been in 1787 or 1789 any constitutional provisions under which they could have claimed protection; but there were no such provisions. Assuming that there was no other class of citizens in the Territory (ignoring a few individuals) holding slaves, the situation was that of denying to one class the right to acquire slaves, and of nullifying the titles to slaves already held by another class. This could not affect the legal power to nullify the titles so held, but it could raise questions of justice and discretion. It was, in fact, solely the law's retroactive operation on the titles of the French inhabitants that led to its non-enforcement.

And, again, what *intent* should be attributed to Virginia? The language used did not explicitly bar future regulation or alteration of titles to all types or any type of property; still less was it an explicit guaranty of property in slaves in particular. If it was intended to be anything more than the usual guard, in international transfers of inhabited territory, against wholesale expropriations and evictions by the new suzerain (such as was involved in the treaty of 1763), the language was notably inapt. It seems clear that its most natural interpretation would be that it was *not* intended as a guaranty of continued recognition of slavery. The strength of antislavery sentiment in Virginia at that time must not be overlooked. All Virginians knew that their state could abolish slavery; whether it should be abolished was a live issue in the 1780's. If it had been intended to *forbid* interference with slavery in all or any portion of the Northwest Territory, is it reasonable to believe that Virginia would have phrased as it was phrased the condition above quoted? It was so framed in a cession offer of January 2, 1781;¹¹² there was ample time to reconsider its phrasing, for it was approved by Congress only on September 13, 1783¹¹³ and on the following March 1 Jefferson, *immediately after delivering Virginia's deed* in which the condition was again recited,¹¹⁴ presented his draft of an ordinance *for the government of all federal territory, north and south, with a clause forbidding slavery in any of it* after 1800.¹¹⁵ Could anybody desire more convincing evidence that

¹¹² Hening, *Statutes*, 10: 364.

¹¹³ *Jour. Cont. Cong.* 25: 560, 562.

¹¹⁴ *Ibid.* 26: 114. The deed was signed by Jefferson, Samuel Hardy, Arthur Lee, and James Monroe—*ibid.* 113, 117.

¹¹⁵ *Ibid.* 119.

Virginia did not understand her cession condition to preserve slavery forever?

But assume the contrary of what has just been presented as reasonable—assume that Virginia did desire to preserve slavery in the Illinois settlements forever, and that her cession condition as it stood unaltered from 1781 to 1784 and continued thereafter should have been construed as a strict compact, in that sense, with the Confederation. The second question is: What formalities would it seem reasonable to require in order to get rid of that compact? Technically, the compact could not be unilaterally altered or rescinded; action would be necessary by the General Assembly of Virginia and by the delegates in Congress of the other states acting under special instructions. But when the Ordinance of 1787 purportedly abolished slavery, this being by hypothesis a violation of the compact of which Virginia might complain, it would certainly be permissible language to say that she waived the violation; and—in fact—the compact itself would not be of a nature to continue thereafter. From a common-sense point of view, therefore, the writer feels that he was justified in suggesting in an earlier volume that Virginia was free to renounce any claims under the conditions in her cession deed, and did so as respects the Ordinance's prohibition of slavery¹¹⁶—*if*, indeed, that had violated the condition.

But did it violate the condition? The answer to that question depends on a double uncertainty. There was no violation if the intent of Virginia and the legal meaning of the condition (assuming no indicated contrary intent) in her *deed* to the Confederation are correctly construed above. And there was also no violation if the provision in the *Ordinance* was not intended to abolish slavery. On this last point, also, opinions have been various.

There are several provisions of the Ordinance to consider. The first one has been assumed by many historians to correspond to the condition of Virginia's deed, but there are six good reasons why this assumption is erroneous. Because, (1) though that condition was undoubtedly a compact, the provision in the Ordinance was not in-

¹¹⁶ The words used are open to improvement: "Clearly Virginia might (and did) renounce under the Ordinance the conditions set in her deed of cession"—*Laws of Indiana Territory* (I.H.C. 21), xxxv n. 4. Only one condition is involved: and renunciation was not by her delegates' vote for the Ordinance, or "under" the Ordinance, but by acquiescing in the postulated violation.

cluded among the provisions labeled "compacts" in that instrument. Instead, (2) it was put by Dane among the provisions relating to descent, wills, and conveyances, and preserved none of the essential language of the condition in Virginia's deed. It recited merely a "saving . . . to the french and canadian inhabitants & other settlers of the Kaskaskies, St. Vincents and the neighbouring villages who . . . [had theretofore] professed themselves citizens of Virginia, *their laws and customs relative to the descent & conveyance of property.*"¹¹⁷ Moreover, (3) this phraseology, though circumstances sometimes require courts to give it a broader meaning, would have been understood by anybody with respectable legal training as referring, *prima facie*, exclusively to land. Most certainly Dane,¹¹⁸ a thoroughly competent lawyer and already embarked on lifetime studies of American statutory law that soon led to his recognition as an expert in statutory drafting, intended the narrow meaning. (4) Again, even if construed to cover all "possessions," with the idea of bringing slaves within that description, the Ordinance provision would still be much further removed than Virginia's condition from carrying an implication of a general perpetuation of slavery. A guaranty to these inhabitants that there should be no change in the laws and customs that had regulated sales and bequests of slaves, would be a guaranty neither to one man nor all men that there should continue to be slaves for sale or bequest. But, anyway, (5) there is no justification for such a broadened construction. And, (6) on the contrary there *are* reasons to believe that giving the passage in question the broader construction would contra-

¹¹⁷ Carter, *Territorial Papers*, 2: 40.

¹¹⁸ See *Dictionary of American Biography*, s.v. "Dane, Nathan." But this rule as to conveyances was *not* what Dane, personally, had desired for the French settlements; he wished immediately—beginning Sept. 1, 1787—to force them to use American recorded deeds of bargain and sale; see his proposal in report of May 7, 1787 on commissioner government for those communities—*Jour. Cont. Cong.* 32: 268. Mr. Burnett is mistaken in supposing this report to be the source ("the chief animating idea") of the Ordinance provision—*The Continental Congress*, 686; they are utterly opposed—see Philbrick, *Laws of Indiana Territory* (I.H.C. 21), lxx, clxvii, ccxvii-ccxviii and n. 4; also report by Governor St. Clair—Carter, *Territorial Papers*, 2: 329. Even in his draft of the Ordinance for first reading on July 11 Dane abandoned his own preference. Reports cited *post* ccxcviii-ccc and n. 156 of Sec. IV show that an attempt was contemplated to differentiate judicial trials of civil cases not involving land, ditto involving land, and crimes; French participation in *all* was desired; they could not have understood our law of land; this probably necessitated the clause that appears in the Ordinance, preserving traditional modes of conveyance. See *ante* n. 14.

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dict the interpretation *given in Congress* to Virginia's condition. The reasons seem rather strong, too. One is this:—there is no evidence whatsoever that in the process of drafting the plan that became the Ordinance of 1787 it occurred to anybody—either while James Monroe headed the committee or thereafter—that Virginia's condition relative to inhabitants of the Illinois Country had anything to do with their slaves.¹¹⁹ And the other is this:—that in considering at the same time as the Ordinance a form of commission government for those inhabitants, as perhaps better suited to their needs, there was again a complete absence of any reference to slave property.¹²⁰ Monroe was also prominent in these latter proceedings. Lands and land titles of the Illinois Country were much on the minds of members of Congress; slaves, seemingly, not at all.

The next provision in the Ordinance of which notice must be taken is the sixth compact article, by which slavery was supposedly prohibited within the Territory. Before quoting that, however, it will be helpful to refer briefly to three earlier proposals relative to slavery in the federal territory. None of these proposals had been agreed to by Congress. The first was that in Jefferson's draft of his governmental plan of 1784. It declared that after 1800 there should be "neither slavery nor involuntary servitude . . . otherwise than in punishment of crimes, whereof the party shall have been duly convicted to have been personally guilty" in the territory to which his bill related; and that was "the territory ceded or to be ceded by Individual States to the United States"—not merely the Old Northwest, but the Southwest which North Carolina and Georgia soon ceded.¹²¹ The second was a

¹¹⁹ Monroe referred to the Illinois Country in his first report as chairman in excluding from the legislative jurisdiction of the territorial legislature Confederation lands; that is, by including lands already sold—among others, those "already vested in . . . the inhabitants of Kaskaskies, St. Vincents, and the Neighbouring villages . . . which rights have been secured to them by the Act of Cession" from Virginia—*Jour. Cont. Cong.* 30: 254. This was omitted in the second report—*ibid.* 405; and in the next report, by Judge Johnson, the simpler provision was adopted that no act of the Assembly should "affect any lands the property of the United States"—*ibid.* 31: 672. There was no reference to the Illinois Country thereafter until Dane introduced into his first draft in an abbreviated form the clause quoted in the text, which was then corrected to conform exactly in *description of parties*, but not corrected at all to conform in *description of that which was confirmed*, to the verbiage of Virginia's deed—*ibid.* 32: 281, 315, 335.

¹²⁰ See reports in *ibid.* 28: 67-68, 155-57, 330-33, 461-62; also (committee: Madison, Clark, Dane; report written by Dane), 32: 266.

¹²¹ Draft of March 1, 1784—*Jour. Cont. Cong.* 26: 119, 118; debate—*ibid.* 247.

motion made in 1785 by Rufus King that a proposition—substantially the same as Jefferson's except that postponement until 1800 was not included—be referred to a committee. It was so voted, but the proposition came back from committee with the postponement until 1800 restored and with an addition providing that "upon the escape" into any federal territory of "any person . . . from whom labor or service" was lawfully claimed in one of the original states, such person might be "lawfully reclaimed."¹²² Nothing more was done with this. After the preceding proposals came the actual provision of the Ordinance of 1787. It differed from its three predecessors in relating to northern territory only; that aside, it was like King's original motion in not including any postponement, and like his amended motion in including a fugitive-slave provision. All three declarations were *intended* to be of compact character.¹²³

¹²² *Ibid.* 28: 164-65, 239; Burnett, *Letters*, 8: 622 n. 5. This proposal of King was, strictly, one for commitment only, not for legislation.

¹²³ The differences are significant in indicating how, in the opinion of the Congress, interstate compacts could be effected.

(1) Jefferson's draft of March 1, 1784 read: "That the preceding *articles* shall be *formed* into a charter of compact, shall be duly executed by the President of the U. S. in Congress assembled under his hand and the seal of the United States, shall be promulgated and shall stand as fundamental constitutions between the thirteen original States and those"—that is, the territories; *ante* clxxii-iii—"now newly described, unalterable but by the joint consent of the U. S. in Congress assembled and of the particular State within which such alteration is proposed to be made"—*Jour. Cont. Cong.* 26: 120; italics added.

Comments—(a) Since the word "articles" is not before used it is not certain whether by that he meant the whole instrument; probably only five numbered "principles" of great importance—*post* n. 370 of Sec. IV. (b) How were they to "be formed" into compacts? By the ceremony described? Or was that to follow their establishment as compacts? They could not be made such by mere ceremonial execution and promulgation—particular states might not have been represented in Congress, as two were not when the Ordinance was adopted, or might have voted in the negative as one did, or might not have voted because their delegates were divided in opinion. (c) At all events, how did Jefferson think the territories ("new States") were to become parties? (d) How was the consent of a "particular state" to an alteration to be given? and why should more be required as to that state for validation of a change than with respect to the original creation of a compact? (e) *Nota bene* that if these provisions had been made compacts they would have included a provision, part of the compacts, that for the purpose of consenting to alterations Congress should be an agent for all the states except one thereby particularly affected. Congress constantly acted on this theory after adoption of the new Constitution—seemingly on sound principles, though unavowed, *ante* excvii-ix; under the Articles of Confederation such action (as Jefferson realized) would not have been adequate, hence his proposal to make the easier procedure available.

(2) The ordinance in final form made no substantial alteration in the above—April 23, 1784, *Jour. Cont. Cong.* 26: 278.

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The form of the compact article in the Ordinance of 1787 was seemingly due entirely to Nathan Dane's judgment of what was likely to pass Congress.¹²⁴ It read:

There shall be neither Slavery nor involuntary Servitude in the said territory¹²⁵ otherwise than in the punishment of crimes, whereof the Party shall have been duly convicted: Provided always that any Person escaping into the same, from whom labor or service is lawfully

(3) Rufus King's motion was, "that this regulation *shall be* an article of compact, and remain a fundamental principle of the Constitutions between the 13 Original States, and each of the States"—*i.e.* territories—"described," etc.—*ibid.* 28: 164; italics added.

Comments—King must have pondered some of the questions asked above. No substantial change was made when the committee reported the proposition back—*ibid.* 239. It is clear, then, that they thought compacts by thirteen states could be *made* by the votes of the delegates who happened to constitute a majority at the time. Nothing was said of alterations.

There is one remarkable thing about King's motion as amended. It came back with these words following those above quoted: "described in the said Resolve of Congress of the 23d day of April 1784, any implication or construction of the said Resolve to the contrary notwithstanding." The writer believes that Jefferson's ordinance was being construed—query (b) above—as requiring, to begin with, an *actual interstate agreement* (which, as the fate of his draft showed, was hardly to be expected as regarded slavery); and hence the two-fold repudiation of that idea in King's own motion—first by positive indication that Congress could itself give to the provisions of a statute a compact character, and secondly *by construing* Jefferson's ordinance (then actual law) in the same way.

(4) Nathan Dane followed this example in the Ordinance of 1787, in which it was simply "*Ordained* and declared by the authority aforesaid"—namely, "*by the United States in Congress Assembled*"—that certain of its provisions "shall be considered as Articles of compact between the Original States and the People and States"—that is, *here*, those subsequently created for admission to the Confederation—"in the said territory, and forever remain unalterable, unless by common consent."

This theory was essentially that of King's motion.

¹²⁴ There is positively no *evidence* that anybody made any suggestions to him on the subject. It was unnecessary to do so; he was himself an anti-slavery man, a personal friend of Rufus King, had worked with him on committees. The fate of the proposals of Jefferson and King, and his own legislative experience in Massachusetts and Congress, would certainly have taught him that merely personal desires were to be avoided in drafting legislation. That he had reflected upon the form of a desirable provision is made clear by the matters referred to in the next note.

¹²⁵ One of the notable improvements Dane made over earlier drafts was in the distinction made between "territory" and "states"; see *ante* clxxii-iv. In his letter of 1830 to Webster there is this passage on King's proposal: "He moved to exclude slavery only from *the States* described in . . . Jefferson's Resolve, and to be added to it"—the Confederation. "It was very doubtful whether the word *States* in that Resolve, included any more territory than the individual States ceded;"—see *Jour. Cont. Cong.* 25: 558 and (Madison's Notes) 956 for clarification of his statement—"and whether the word *States* included preceding *territorial condition*. Some thought his motion meant only *future* exclusion, as did Mr. Jefferson's plan clearly;

claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.¹²⁶

In form this was an outright prohibition of slavery. Dane declared that by the Ordinance "slavery [was] excluded from its date and forever from every part of this whole territory . . . northwest of the River Ohio."¹²⁷ On the other hand the enactment contained the provision respecting fugitive slaves, above quoted; likewise the provision relating to "descent and conveyance of property" above discussed; the right to secure representative government was based on the attainment of a certain population of "free male inhabitants of full age," representation was based on "free male inhabitants," and admission to the Confederation was made dependent upon attaining a certain population of "free inhabitants."¹²⁸

Mr. Dunn has said of all these provisions, considered together, that they "are so enigmatical that no man, to this day, can say with assurance what is provided" on the subject of slavery.¹²⁹ This pronouncement is unjustifiably extreme. The intent and proper legal effect of the Ordinance seem reasonably clear. Confusion respecting it arose in the Illinois Country because of certain circumstances, including regrettable actions by Governor St. Clair. It is not difficult to free the Ordinance of these extrinsic confusions.

The reason for the presence of the references to "free" inhabitants will be obvious to anyone who will recall that the Ordinance as submitted to Congress on July 11 (as drafted by Dane) *did not contain* Article VI. It was approved that day with the provisions in question,

therefore, in forming the Ordinance of '87, all about States was excluded . . . and that Ordinance made, in a few plain words, to include 'the territory of the United States north-west of the river Ohio' . . . and the sixth article excluded slavery for ever from 'the said territory'"—Massachusetts Historical Society *Proceedings*, 1867-1869: 478.

¹²⁶ Carter, *Territorial Papers*, 2: 49.

¹²⁷ Dane, *Abridgment*, 9 (app.): 75; also in the passage quoted *ante* n. 120.

¹²⁸ Carter, *Territorial Papers*, 2: 44, 49. The provision respecting representative government read: "So soon as there shall be five thousand free male inhabitants of full age . . . they shall receive authority . . . to elect representatives . . . to represent them . . . , provided that for every five hundred free male inhabitants there shall be one representative." Did this imply that suffrage was restricted to free males? Certainly—necessarily if there were to be *no* unfree males in the Territory. Did it contradict the suffrage qualifications elsewhere (p. 44) stated without mention of "free"? Not at all—it supplemented them.

¹²⁹ *Indiana*, 210.

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and if nothing more had been done the situation in the Territory might have been identical with that in states where slavery existed but slaves were excluded from suffrage and from the population-unit upon which legislative representation was based. But Dane, sensing from the attitude of delegates that Congress would favor a prohibition of slavery, introduced (after all other matters had been voted on) Article VI, which was likewise approved. Naturally, he did not first remove the word "free" from the other provisions earlier approved and venture everything with the test on Article VI. The Ordinance then read that slavery was abolished, and—repetitiously—that only free men could vote and be represented in the legislature. Did these two provisions, read thoughtfully (and without gratuitous imputation of either wile or stupidity to the draftsman), imply that there could be in the Territory a class of unfree persons? Can it be reasonably said that any obscurity or inconsistency arose from the juxtaposition of the several provisions in question? To both of these questions the writer would unhesitatingly give a negative answer. And that would seem to have been the attitude of antislavery men of that time. Dane was himself uncompromisingly opposed to slavery and was a trusted friend of Rufus King and other antislavery leaders. None of these friends has left any criticisms of him in this connection, nor did any express dissatisfaction with the Ordinance. The same is true of his enemies, if such there were. Manasseh Cutler was certainly not a personal friend, and did (unjustifiably) criticize Dane's handling of Article VI; all writers agree, too, that he saw those portions of the Ordinance which contained the references to "free" inhabitants, but he recorded no criticism of them. In view of the complete absence of indications that they gave any trouble then, and of the various reasons given above, it seems reasonable to conclude that Mr. Dunn and other historians have quite needlessly misread the Ordinance and misconceived its proper legal construction.

The French in the Illinois Country became confused on these matters because speculators who hoped to buy their lands at low prices stimulated fears of immediate (and unrecompensed) emancipation of their slaves in order to induce them to migrate to Missouri, while at the same time their agent in New York sent back opinions (unofficial and irresponsible) that no emancipation was intended. They may even have been confused regarding the guaranty of their old customs

of descent and conveyance. Governor St. Clair, who had served for years in Pennsylvania in minor judicial offices, quite properly understood that to refer to land only,¹³⁰ and when he finally got to the Illinois Country in 1790 ended (unless for historians) misapprehensions respecting it. He seems also to have *understood* correctly the Ordinance's intent as to slavery, though he took it upon himself to calm the Illinois Country with unjustifiable assurances that necessarily prejudiced any policy of enforcing the Ordinance's antislavery article.

It has now been shown that a cession compact relative to the French of the Illinois Country did exist between Virginia and the Confederation, but that it was not a compact for the perpetuation of slavery or even relating to slavery. It has been shown that the provision in the Ordinance relative to those inhabitants was likewise one not relating to slavery; and also that it did not restate in form or substance the cession compact, but was wholly different, and cannot possibly be considered as made in performance of the compact. No issue as to violation of one by the other—were both properly construed—could ever have arisen. It never fell to the Supreme Court to consider these matters, but it is quite clear from the decisions of that Court above considered—with reference to provisions within the so-called compact articles which it held to be mere legislation—that *a fortiori* it would have held *this* provision of the Ordinance, saving to the French inhabitants their customary law of descent and conveying, to be mere legislation.

The writer's opinions (confessedly somewhat bizarre among those generally prevailing) are: that Virginia's condition in her deed of cession was not intended to be a guaranty of continuing slavery; that this was the understanding of Monroe and others in Congress; that Congress was free to abolish slavery in the Northwest; that it had power to do so despite the cession compact between Virginia and the Confederation; and also under the Constitution of the new Union as

¹³⁰ He referred to it in connection with land when he reported (Feb. 10, 1791) to the Secretary of State on his proceedings in the Illinois Country in the spring of 1790 (March 5 to June 11). "The Laws and Customs which had prevailed among the ancient Settlers are to be continued so far as respects the Descent and Conveyance of real property"—Carter, *Territorial Papers*, 2: 329. See also *post.* before and after notecall 167.

The writer believes that the vast majority of lawyers would share his amazement over Mr. Dunn's utter disregard of legal tradition in this matter—*Indiana*, 219-20.

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shown in the preceding section of this introduction;¹³¹ that the sixth compact article of the Ordinance was ample to accomplish the purpose if not weakened by the other provisions of that instrument above stated; that there was no inconsistency, as a matter of logic or law, between such abolition and the fugitive-slave proviso; that there was likewise no inconsistency whatever between the abolition of slavery and the guaranty to the French of the Illinois Country of their old law with reference to descent and conveyance—which (though Dane, unfortunately, did not explicitly so state) was in perfectly clear language limited to land; that there was no inconsistency between the slavery prohibition and the references to “free” inhabitants—which therefore justified no misunderstanding of the Ordinance by anyone who would read with the care it merited; and that therefore the government, showing some sense in inquiring into the understanding of Monroe and others regarding the matter, should have instructed its officers and proclaimed to the inhabitants that slavery was abolished, although the inhabitants would be allowed ample time (stated) to adjust their affairs; and Congress should have passed supplementary legislation to provide for the enforcement of this policy.¹³²

Although it seems impossible to blame Dane in the matter, one must regret that he did not, out of excessive caution, make impossible misconstructions of the Ordinance’s phraseology, since these facilitated the nullification of its slavery prohibition. There is not the slightest reason to question that Dane intended to abolish slavery forthwith and completely in the Northwest and believed he had done so,¹³³ just as Jefferson had wished to do three years earlier. Nor would there be a trace of evidence that any of those who passed the Ordinance doubted its abolishment of slavery were it not for the assurances given Tardiveau a year and a half later by St. Clair and “other members” of the old Congress—who possibly had, like St. Clair, not voted on the Ordinance.¹³⁴ Nor is there, seemingly, evidence that when

¹³¹ *Ante* cxlviii seq.

¹³² These conclusions are in general agreement with views briefly expressed by the writer in 1930—*Laws of Indiana Territory* (I.H.C. 21), xxxv and n. 4, ccxvii-ccxviii and n. 1. At that time, however, the evidence had not been systematically considered.

¹³³ *Abridgment*, 7: 442-50, 9 (app.): 75.

¹³⁴ *Post* n. 148. President Hinsdale has some remarks seemingly intended to suggest that perhaps Congress did not know it was abolishing slavery. He starts with the proposition that “The long and fierce contest over the extension of slavery, which did not begin until many years afterward, gave to

Congress in 1789 re-enacted the Ordinance, in order that it might "continue to have full effect,"¹³⁵ efficacy of the slavery article was doubted. There could have been no southern tradition to the contrary, as the Missouri debates plainly showed. Chief Justice Taney, though denying *legislative* power in Congress to abolish slavery, conceded its abolition in the Northwest by agreement of the sovereign states, and admitted that the act was definitive.¹³⁶

That in fact slavery was *not* abolished—that the territorial government deliberately approved, and the national government permitted, its continuance—is amazing. "We learn from actual politics," Professor Macy once wrote, "that a positive statute sometimes expresses an ideal, a hope, or an aspiration; sometimes it is an advertising agency."¹³⁷ No doubt some historians follow Professor Channing in believing that the Ordinance was only a declaration of ideals;¹³⁸ presumably, then, that Article VI was ineffective even as a legislative (and therefore mutable) prohibition of slavery. Some have thought it was an abolition statute *and* an advertisement for free-soil immigrants. Justin Winsor thought its abolition feature was never advertised for fear of discouraging immigration.¹³⁹ St. Clair merely ignored its plain wording; treated it as an enactment not intended to be literally enforced; and yet it was no sop to a minority, but the embodiment of manifestly dominant sentiment.

To what extent the views that have been expressed by the that prohibition"—the Ordinance's—"an importance which no one dreamed of according to it at the time of its enactment"—*Old Northwest*, 346. Men like Jefferson, Pickering, King, and Grayson would not have agreed to that; and no more so, presumably, proslavery southerners—who had been sufficiently awake to danger to defeat the motions of 1784 and 1785. Hinsdale then adds: "The fact is, the article was not of the substance of the Ordinance. It was not even a part of the original draft";—true, but it is also true that until put into that first draft of July 9 by Dane, the Ordinance contained *none* of what Hinsdale elsewhere called "the six bright jewels in the crown that the Northwest Territory was ever to wear" (*ibid.* 271). And then he concludes: "There is no reason to believe that Mr. [Richard Henry] Lee of Virginia, changed his views on the subject of slavery in the interval, but he voted against the prohibition of 1784, and for the prohibition of 1787"—*ibid.* 346. But Hinsdale forgot that Jefferson's motion of 1784 covered the Southwest.

¹³⁵ Carter, *Territorial Papers*, 2: 203. According to William Henry Smith the bill was drawn by Governor St. Clair—*St. Clair Papers*, 2: 120.

¹³⁶ *Ante* lxxxvii-ix and cxix-xxii.

¹³⁷ Jesse Macy, "The Relation of History to Politics," *American Historical Association Report*, 1893: 185-86.

¹³⁸ E. Channing, *A History of the United States*, 3 (1912): 547.

¹³⁹ *Post* n. 143.

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writer respecting the true meaning of the instrument were accepted in government circles at the time of its enactment cannot be known. That they did not prevail in the executive branch, charged with enforcement of the law, is manifest. Some reasons for that are also manifest.

In the first place, the meaning of the "descent and conveyance" guaranty was (or was made), as already said, confusing to persons ignorant of property law. Much more so was the fact that slaves held within the Territory by the "french and canadian inhabitants & other settlers . . . citizens of Virginia" could be thought of (particularly by those who desired to find security in doing so) as *unfree* inhabitants whose presence in the Territory seemed to be implicitly referred to in the Ordinance. To these slaves there were later added those of British owners in the northwestern portions of the Territory, whose titles were (as customarily stated) "guaranteed" by Jay's Treaty—but most certainly should have been held to be guaranteed temporarily and solely in the sense above explained.¹⁴⁰ (And this modification of the Ordinance's supposedly unalterable prohibition-of-slavery clause by a treaty illustrates the equality of treaties and congressional legislation already adverted to.) If one *assumes* that there was a legal basis for the *indefinite* existence within the Territory of these two classes of slaves, then there is only one way to reconcile the Ordinance's antislavery article with the fact thus assumed; and that is, to conclude that what the Ordinance actually prohibited was, merely, any further importation of slaves into the Territory. That assump-

¹⁴⁰ By Art. 2 the British were obligated to evacuate the posts in the Northwest by June 1, 1796, "The United States *in the meantime*, at their discretion, extending their settlements . . . except within the precincts or *jurisdiction* of any of the said posts. All settlers and traders, within the precincts or jurisdiction of the said posts shall continue to enjoy, unmolested, all their property of every kind, and shall be protected therein. They shall be at full liberty to remain there, or to remove with all or any part of their effects; and . . . to sell their lands, houses, or effects, or to retain the property thereof, at their discretion; such of them as shall continue to reside . . . shall not be compelled to become citizens of the United States." And then, as to lands, the ultimate principle was made entirely clear in the specific provisions in Art. 9 respecting lands. It declared that British subjects who continued to hold (own) lands within the United States should "continue to hold them according to the nature and tenure of their respective estates and titles therein; and may grant, sell, or devise the same . . . as if they were natives."

See Dunn, *Indiana*, 220, 252-53; W. W. Blume, ed., *Transactions of the Supreme Court of the Territory of Michigan, 1805-1836* (6 vol. 1935-1940), 1: 387-89, 395, 405, 415, 417.

tion has generally been made.¹⁴¹ The writer's opinion is that *no* legal basis existed for the continuance of the two classes of slaves in question. For (1)—as regards protection given to British owners of slaves within the jurisdiction of the northwestern posts, that was plainly limited to the period preceding evacuation by the British, and thereafter the rights of owners were to be those of American citizens merely—that being explicitly stated as to lands, and fairly impliable as to slaves on general principles and by parity of reasoning. And (2)—as regards slaves in the French settlements of the Illinois Country, no guaranty of any kind can be found. Consequently the writer rejects the limitation of the Ordinance's meaning that is arrived at by making the assumption in question.

The Ohio Company may possibly have been to a greater or less degree responsible for what happened. It will be shown later that the story of participation by it or by Manasseh Cutler in the formation of the Ordinance rests upon virtually no trace of evidence; yet at least they should have been jubilant over its exclusion of slavery if they held any of the ideals—beyond that of cheap land—with which they are habitually credited. Writers have debated much the question who put the slavery article into the Ordinance. It was equally important to give it reality, once there. Characteristically enough, antislavery contemporaries seem to have given no thought to this, and historians have virtually ignored it. The enactment, being in the book, was supposed to be self-executing. These idealists of New England, whom, primarily, the slavery prohibition was designed to gratify,¹⁴² seemingly did nothing for it. According to Justin Winsor it was "apparent that the [prohibition] provision . . . was never proclaimed, for fear of the influence it might have to prevent emigration to the territory. There is indeed no evidence that the supposed fact of prohibition was ever used in any advertisement of the Ohio Company to advance settlement."¹⁴³ As no one did anything to combat misunder-

¹⁴¹ Judge Cooley, for example, in his *Michigan* (1885, 5th ed. 1890) simply took facts as they were and included a third class of *American slaves brought in from our states*. He did not inquire whether any of these facts had legal justification in their beginning.

¹⁴² "In the years 1784, '85, '86, and '87, the Eastern members in the Old Congress really thought they were preparing the North-Western Territory principally for New-England settlers, and to them the third and sixth articles of compact more especially had reference"—Dane to Webster, March 26, 1830—*Mass. Hist. Soc. Proceedings*, 1867-1869: 480.

¹⁴³ *Westward Movement*, 287. No light is thrown on this matter by

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standing, the battle—though as it turned out, not the cause—was lost.

The understanding of those who first communicated news of it to the Illinois Country was that slavery would be extirpated,¹⁴⁴ and since the retention by its inhabitants of the lands granted to them by Congress required them to remain in the Territory, while the retention of their slaves would then, they believed, be impossible, large numbers—whose fears were aggravated by land speculators who desired to buy them out—moved to the Spanish dominions across the Mississippi.¹⁴⁵ The first prayer of their agent in the East was merely for the repeal or modification of the article “so far as it operates as an Ex post facto law.”¹⁴⁶ But later, consulting in New York the president (General St. Clair) and “several other members” of the Congress, he was assured that “there would not be the least difficulty . . . the intention had been solely to prevent the future importation of slaves . . . ; that it was not meant to affect the rights of the ancient inhabitants.”¹⁴⁷ St. Clair had not been in touch with the Ordinance in the last stages of its formation,¹⁴⁸ and was not one of the men who had been connected with the process of drafting it during the year and

Mr. A. B. Hulbert's introduction to *The Records of the Original Proceedings of the Ohio Company* (1917); compare xcvi. Mr. Stone has also remarked that “in the pamphlets issued by the Ohio and Scioto Companies . . . [we do not] find this feature of the Ordinance dwelt upon as one that would encourage emigration”—F. D. Stone, “The Ordinance of 1787” (1889), *Pa. Mag. of Hist. and Biog.* 13: 309, 325.

¹⁴⁴ Major Hamtramck wrote on April 11, 1789 from Vincennes to General Harmar, “Will you . . . inform me if Congress have changed their resolution respecting the freedom of the negroes of this country; and if they are free from the day of the resolve, or if from the day it is published in a district”—quoted by A. C. Boggess, *The Settlement of Illinois, 1778-1830* (1908), 64.

¹⁴⁵ Philbrick, *Laws of Indiana Territory* (I.H.C. 21), lxxv n. 2; Major Hamtramck to General Harmar, Feb. 28, 1789—C. W. Alvord, *Kaskaskia Records, 1778-1790* (I.H.C. 5), 502; memorial of B. Tardiveau to Congress, July 8, 1788—*ibid.* 485.

¹⁴⁶ B. Tardiveau to Congress, Sept. 17, 1788—*ibid.* 491, 493.

¹⁴⁷ He received these assurances, probably, in Dec. 1788. B. Tardiveau to A. St. Clair, June 30, 1789—W. H. Smith, *St. Clair Papers*, 2: 118; Major J. Hamtramck to General Josiah Harmar, Aug. 14, 1789—Alvord, *Kaskaskia Records* (I.H.C. 5), 508.

¹⁴⁸ The last debate on it, before Dane introduced on July 11 his draft for first reading, was on May 10—*Jour. Cont. Cong.* 32: 281 n. 1. He is not recorded in voting between May 11 and July 17—*ibid.* 33: index s.v. “St. Clair—votes.” Dr. Cutler had a letter to him—W. P. Cutler, *Manasseh Cutler*, 2: 229—and arrived in New York on July 5, but did not pay his respects until July 18—*ibid.* 292; St. Clair, therefore, was presumably absent during all the time when the Ordinance was remade and adopted. One may hazard the guess that the other members of Congress seen by Tardiveau were southerners (very likely friends of St. Clair—*ibid.* 298).

more preceding. It is doubtful whether St. Clair himself ever consulted any of those men, or asked any first-class lawyer to construe the enactment. When he finally got out to the Illinois Country in 1790 he took it upon himself to give the French population an interpretation of the enactment—still, so far as appears, without having gathered opinions from others, and in particular without having secured an official opinion from the Attorney General. That he should not have consulted the legal officer of the government he represented is nothing less than amazing.

I have thought proper [he wrote] to explain the Article respecting slaves as a prohibition to any future introduction of them, but not to extend to the liberation of those the People were already possessed of, and acquired under the Sanction of the laws they were subject, at the same time I have given them to understand that Steps would probably be taken for the gradual Abolition of Slavery, with which they seem perfectly satisfied.¹⁴⁹

These acts, although most extraordinary, were less so than was the scanty sense of proportion displayed by St. Clair in reporting them. He informed President Washington of his action only in a brief postscript to a long letter, and later devoted only one sentence to it in a fifteen-page official report to the Secretary of State on his acts in the Illinois Country. It seems extraordinary that Washington, in turn, secured no official interpretation of a law which it was his duty to execute. St. Clair's opinions were repeated three years later in a letter to a prominent proslavery resident of Indiana:

I am more and more confirmed in the opinion. . . . That the declaration was no more than the declaration of a principle which was to govern the legislature in all acts respecting that matter, and the courts of justice in their decisions upon cases arising after the date of the Ordinance . . . but could have no retroactive operation whatever; and the grounds upon which that opinion is founded are—that, in the first place, retroactive laws being generally unjust in their nature have ever been discountenanced in the United States, and in most of them are positively forbidden; and [in the second place?] that slaves being a species of property countenanced in . . . that part of the Territory which you inhabit, by the ancient laws, . . . Congress would not divest

¹⁴⁹ St. Clair to President Washington, May 1, 1790—Carter, *Territorial Papers*, 2: 248. William Henry Smith wrote of this that St. Clair "confirmed the interpretation put upon the compact"—W. H. Smith, *St. Clair Papers*, 2: 119 n. 1. Interpretation by whom? Seemingly his own interpretation given earlier to Tardiveau—*ante* n. 147.

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any person of that property without making him a compensation, though they doubtless had a right to determine that property of that kind afterwards acquired should not be protected in future, and that slaves imported into the Territory after that declaration might reclaim their freedom. And this I take to be the true meaning and import of the clause of the Ordinance, and when I was in the Illinois country I gave the people there my sentiments on this subject in the same manner, which made them easy. . . .

This I believe to be the true construction of the Ordinance, but I will endeavor to obtain the opinion of the judges upon the point, and transmit it for the satisfaction of the people. *In the meantime*, it will not be improper that they should be made acquainted with mine.¹⁵⁰

Seemingly it *was* improper; for after all he was charged merely with executing the laws, and not primarily with declaring what they were. Whether the judges ever gave him an opinion does not appear. A strong suspicion may be hazarded that if the matter was discussed the Governor was strongly opposed by two of the three members of the General Court.¹⁵¹

The nature of the slavery article in the Ordinance, as being or not being a compact of permanent character, was of course not involved in St. Clair's actions. He was merely construing the provision. In examining the acts of Congress in which the slavery article was involved—or the judicial opinions dealing with those acts—one again is faced with the problem of compact terminology. Ohio's enabling act required her constitution to be "not repugnant to" the Ordinance.¹⁵² Its prohibition of slavery, it will be remembered, was subject to a proviso for the surrender of slaves that entered it as fugitives from the "original states." The Ohio constitution, which Congress approved,¹⁵³ adopted the prohibition but omitted the proviso.¹⁵⁴ This was manifestly "a departure from" the words of the Ordinance, and as a matter of form constituted

¹⁵⁰ Letter of Oct. 11, 1793 to Luke Decker—*ibid.* 2: 318.

¹⁵¹ As to Judge Turner see Philbrick, *Laws of Indiana Territory (I.H.C. 21)*, cxli-cxlii. As regards Judge Putnam, however, one must be content with a mere suspicion. In Rowena Buell, *The Memoirs of Rufus Putnam and Certain Official Papers and Correspondence* (1903), there is no word on slavery between 1787 and 1792 (pp. 102-26), and no letters of 1786-1789 are printed. On Judge Symmes see C. H. Winfield, "Life and Services of John Cleves Symmes," *New Jersey Historical Society Proceedings*, 2d ser. 5: 22-43. No nonmaterialistic interests in Symmes seem to be noted in B. W. Bond, Jr., ed., *The Correspondence of John Cleves Symmes* (1926).

¹⁵² Act of April 30, 1802, sec. 5—*U. S. Stat. at Large*, 2: 173.

¹⁵³ Act of Feb. 19, 1803—*U. S. Stat. at Large*, 2: 201.

¹⁵⁴ B. P. Poore, *Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the U. S.* (2 vol. 1877), 2: 1461 (art. 8, sec. 2).

repugnance to it. However, this difficulty—assuming that Congress (old or new) ever had power to give permanently binding force to the Ordinance's provisions—could be evaded by saying (as justices of the Supreme Court of the United States did say)¹⁵⁵ that the people of the Territory manifested by the constitution they adopted, and “the States” manifested by the vote of their representatives in Congress in “accepting” that constitution, the “common consent” which sufficed for the cancellation of any compact—that is, totally or partially, and so for the cancellation of the proviso attached to the antislavery compact.

Such an explanation, whether specious or not, was wholly unnecessary. The fugitive-slave provision, had it been retained in the state constitution, could not have existed, legally speaking, for an instant after Ohio attained statehood, since in her constitution it would have been an idle repetition of the fugitive-slave provision of the federal Constitution. An assumption that that fact was realized both in Congress and in the state convention that framed Ohio's constitution is the only explanation of the proviso's omission that is today legally acceptable. Consequently, the judges did not need to show that the compact was duly executed as it prescribed. It is, however, perhaps fair to assume that the reasoning of the time was then more accordant with the judicial suggestions just quoted. The case is referred to merely to illustrate the hang-over of the compact superstition.

Return now to the question whether the above-suggested revocation of a postulated compact, by common consent, was specious. It is perfectly clear that such reasoning was not technically accurate, for it was the “original states” that were named as parties to the compact, and all or some of them might not have voted, or might have voted in the negative, on the acceptance of Ohio's constitution. Assuming, however, that the phrase “original states” in the compact should be taken to mean “the states then members of the Union”—and remembering that since 1789 Congress exercises the national sovereignty within its delegated powers, and therefore with respect to the admission of states—the explanation becomes acceptable in a *mechanical* sense. Despite compact words and compact theory Congress always, actually,

¹⁵⁵ For example, Justice McLean in *Spooner v. McConnell* (1838), 1 McLean 337, at 343, and Justice Catron in *Strader v. Graham* (1850), 51 U.S. 82, 98.

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in altering *any* provisions of the Ordinance, acted in this way, voting merely by a majority in each house.

The only way in which the nature of the supposed compact articles could be tested was by a complaint against their alleged violation—as in the Permoli and Pollard cases above discussed. No such test of the slavery provisions of the Ordinance was ever made. In the writer's opinion the officials of the Territory failed to perform their duties under those provisions, and it could have been determined, in proceedings to compel them to do so, whether the people of the territory or one of the original states was in truth a party to a compact. If not (and of course it would have been so held, as in the cases just referred to), only legislation by Congress being involved, the way would have been equally open to test Governor St. Clair's performance of his duties thereunder.¹⁵⁶ Again, it seems that the antislavery people were apathetic. In the absence of a legal test and check Congress could do anything that it desired and seem to be acting under its ordinary constitutional powers.¹⁵⁷

The result was the attempt to make Indiana and Illinois slave

¹⁵⁶ Malfeasance of Judge Turner of the General Court of Kaskaskia in the spring of 1795 was examined, following remission of a popular petition to Congress. The House of Representatives called for a report by the Attorney General; the President instructed the Secretary of State to take steps for trial of Judge Turner before the General Court of the Territory. The statements in W. H. Smith, *St. Clair Papers*, 1: 195-96, are somewhat different.

¹⁵⁷ When the people of the Territory (a) were *willing* to waive a compact, as they were in the case of the fugitive-slave provision (though a waiver when becoming a state was actually a waiver of nothing), they were also willing to ignore the original states in accepting a mere majority vote of Congress. Thus, in such cases there would be involved no action even in appearance (and, in legal truth, contrary to the initial assumption, no action in fact) on a compact.

Assume, on the other hand, that the desires of these two parties conflicted. Had this latent conflict arisen (b) when transition from the status of a territory to statehood was contemplated, the will of either party opposing change in a "compact" could have prevailed. Congress, if opposing change, would have needed only to refuse statehood; and the people, if opposing change (as they would have opposed alteration of the prohibition of slavery) would have needed only to renounce statehood. Here again, in the absence of a legal test of the compact, everything would appear to be covered by the discretion lodged in Congress by the Constitution to admit or not admit a state. Finally, had latent conflict existed (c) between the two parties over the enforcement or the repeal of a supposed compact during continuance of the territorial status (as happened in the case of the slavery article), everything done by Congress would appear to be done under its virtually unlimited constitutional power to regulate territorial affairs.

states.¹⁵⁸ The slavery question was ultimately settled in the Old Northwest in accord with the Ordinance's provision, but it was not the Ordinance—whatever the intent of its framers, whatever its true legal character—that made the Northwest free soil. It was the vast predominance of northerners among immigrants into the Territory in the generation after enactment of the Ordinance that made certain the exclusion of slavery. No matter whether that instrument's antislavery provision was or was not advertised to stimulate northern immigration, there can be little doubt that the provision was well known and its power exaggerated, and that, as one of Ohio's early representatives in Congress said, it served as a cloud by day and a pillar of fire by night to the northern emigrants who speedily made Ohio a free state, and to those who by virtue of prevailing local sentiment similarly made free soil the rest of the Old Northwest.¹⁵⁹ For that reason it is impossible to accept Justin Winsor's view that "the ordinance can hardly be said to have been *instrumental* in keeping human bondage out of the northwest in later years." Nor can the writer accept his other opinions that the provisions of the law "were operative just so far as the public interests demanded, and no farther" and that "the ordinance simply shared this condition with all laws in communities which are self-respecting and free."¹⁶⁰ There was no "self-respecting and free" population of Americans in 1787 northwest of the Ohio to whom prohibition dictated by a distant government could have given offense. The French would doubtless have been compensated had the Ordinance been construed as presently abolishing, rather than as merely forbidding the future introduction of slavery; and Governor St. Clair reported that they were satisfied with an assurance that emancipation would be gradual.

The true meaning of the statute and likewise the intent of its framers—which are two quite distinct matters—were matters for proper governmental inquiry. The writer has desired, primarily, to

¹⁵⁸ Dunn, *Indiana*, ch. 5 and 6; Philbrick, *Laws of Indiana Territory* (I.H.C. 21), index s.v. "slavery." On the slaves in the Illinois Country before and after 1787 see also Hinsdale, *Old Northwest*, 347-51.

¹⁵⁹ John Reynolds' testimony is that of one who understood that the Ordinance was merely *construed* as forbidding the future introduction of slavery, and who was intimately acquainted with public sentiment in Illinois from 1800 onward, and he wrote: "This act . . . secured the States of Ohio, Indiana, and Illinois from slavery. I never had any doubt but slavery would now [1855] exist in Illinois if it had not been prevented by this famous Ordinance"—*My Own Times* (1879 ed.), 132 (ch. xliii).

¹⁶⁰ *Westward Movement*, 289, 290.

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show that various reasons habitually given in justification of the view that the statute was merely prospective in its prohibition of slavery rest either upon complete misreadings of plain and simple language or upon disputable interpretations. If the intendment of the statute was as the writer believes, then the inaction of Congress in failing to pass supplementary legislation, coupled with the presumptuous procedure of Governor St. Clair, constitute an extraordinary example of administration as inapt as its consequences were unfortunate.

It would require much space to discuss here the action by the courts in cases involving the effects of the slavery article.¹⁶¹ It may be said, however, that their record is far superior to that of the other departments of government, though marked by inconsistency. In particular the courts of several slaveholding states recognized the emancipatory effect of the Ordinance.¹⁶² So, for example, Chief Justice Gamble of the Supreme Court of Missouri—dissenting from that Court's decision that Dred Scott became a slave upon his return to Missouri, regardless of prior residence in territory declared free by the Missouri Compromise—refused to recognize as other than *definitive* the free status which that Court had for many years held was *acquired* by the residence in free territory.¹⁶³

¹⁶¹ See Mr. Dunn's excellent chapter—*Indiana*, ch. 6; the decisions in the Michigan courts reported by Mr. Blume, *ante* n. 140; W. H. Smith, "The First Fugitive Slave Case of Record in Ohio," *Amer. Hist. Assoc. Report*, 1893: 93-100; the discussion of the state decisions in the opinions of the various judges in *Dred Scott v. Sandford* (1857), 60 U.S. 393-633; and J. C. Hurd, *The Law of Freedom and Bondage in the United States* (2 vol. 1858-1862), 2: secs. 664-82.

¹⁶² Whether or not with preference for its supposed compact character is not here in question. Benton quoted Sidney Breese as follows, from a speech by him in the United States Senate in 1848: "In all his observations and experience in cases of this sort,"—involving the status of Negroes—"and they have not been inconsiderable, he has discovered that the courts of the slave States have been more liberal in their adjudications upon the question of slavery than the courts of some of the free States. The courts of one of them (Illinois) had uniformly decided against the right of freedom claimed by persons held in bondage under a modified form of servitude recognized by its old Constitution"—of 1818—"In precisely similar cases, the courts of Kentucky and Missouri, to which such persons had been taken decided in favor of the right to freedom. And it is a remarkable fact that in all cases in these States, and he believed in other slave States, where there was any doubt about the right to hold the person in slavery, the decision has been invariably in favor of the right to freedom"—T. H. Benton, *Dred Scott Case*, 45 n.

¹⁶³ "In this State it has been recognized from the beginning of the Government . . . that a master who takes his slave to reside in a State or Territory, where slavery is prohibited, thereby emancipates his slave. . . . These

It has been seen above that before the middle of the last century it had become clear from decisions of the Supreme Court on *other* than the sixth "compact" of the Ordinance that Congress could not permanently abolish slavery by making the compacts in that enactment a constitution for both the Northwest Territory and the future states to be formed therein. In the present section of this introduction we have been concerned solely with emphasizing the differences between the true compacts that underlay the Ordinance and the pseudo compacts contained therein. Admitting their insufficiency, as compacts, to control slavery permanently, the question remained whether Congress had constitutional power even to prohibit slavery by legislation in a territory. That question came before the Supreme Court in 1856 in the case of *Dred Scott v. Sandford*. The decision of the Court on that point has been analyzed in the first section of this introduction, and the conclusion reached that the decision, denying such power to Congress, was unsound.

To the foregoing discussion of the misinterpretations given to the Ordinance's guaranty to the French inhabitants of their old law and customs relative to descent and conveyance, it remains only to add that even in its proper and narrow sense¹⁶⁴ it was not observed as a guaranty in perpetuity. Under those customs land was conveyed by relatively informal papers executed before notaries, all wills were executed before notaries, and the property of the intestates was distributed by notarial acts.¹⁶⁵ When Governor St. Clair was in the Illinois Country in 1790 he commissioned notaries in order to enable them to continue officiating in conveyances,¹⁶⁶ but it would seem that he did not realize the extent of their other functions. At any rate, in 1795, "having been informed that the Notaries public [took] upon themselves to settle all testamentary affairs of the French Inhabitants and the Estates of such persons among them as happen to die intestate,"

decisions, which come down to the year 1837 seem to have so fully settled the question, that since that time there has been no case bringing it before the court for any reconsideration until the present"—dissenting opinion by Chief Justice Gamble in *Scott*, a man of color *v. Emerson* (1852), 15 Mo. 576, at 590. See citations *ante* n. 161.

¹⁶⁴ See *ante* n. 130.

¹⁶⁵ Compare Philbrick, *Laws of Indiana Territory* (I.H.C. 21), lxxi, clxvii.

¹⁶⁶ "The mode of conveyance was an Act before a Notary, and filed in his Office, of which an attested Copy was delivered to the Party—to fulfil that part of the Ordinance it was necessary that Notaries public should be appointed"—report of Feb. 10, 1791 by St. Clair to Secretary of State, Carter, *Territorial Papers*, 2: 329.

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he ordered the probate judges in the two Illinois counties to make known that "everything relating to the Estates of deceased persons, whether real or personal, [was] within the province of the Judge of Probate and the Orphans' Court, and [that] any interference of the Notaries, [was] nugatory as to the Effect, and illegal as to the Act."¹⁶⁷

"The ancient mode of Conveying real Estates and *the manner in which* such Estates descend to Heirs by the french *Laws*" were all, he said, that were reserved. This was of course a narrow restriction of the guaranty of "*laws and customs . . . relative to the descent . . . of property.*" He also construed the limitation—correctly, without question—as not in perpetuity, but either only until after laws should be adopted by the governor and judges "to regulate the Descent and Conveyance of real property, or until a Legislature by representation [should be] formed."¹⁶⁸ The latter was not accomplished until seventeen years later. No territorial law on descent or conveyances (in general) had yet been passed. But when they were passed they were put into effect without continued exception in favor of the French inhabitants.

¹⁶⁷ Oct. 7, 1795—Carter, *Territorial Papers*. 3: 443.

¹⁶⁸ *Ibid.* Italics added.

SECTION IV

THE GOVERNMENTAL PLAN OF THE ORDINANCE OF 1787 ITS RELATIONS TO JEFFERSON'S PLAN OF 1784

The primary purpose of the Ordinance was to provide "for the government of the territory of the United States Northwest of the river Ohio," as indicated by its title. For generations those words were read as equivalent to the words "government of the people now *or hereafter* occupying the lands northwest of the Ohio," since it was assumed that the Ordinance not only regulated the government of those people preceding their reorganization for admission to the Confederation or the present Union but also controlled their action on vital matters thereafter. The nature of these supposedly permanent provisions of the enactment has been discussed in the last preceding section of this introduction, and it has been seen that their true nature was made clear a hundred years ago in decisions by the Supreme Court of the United States. It has also been seen, however, that notwithstanding those decisions many persons, including members of that Court, continued to talk about "compacts." It now remains to consider the provisions of the Ordinance that were always understood to be merely legislative, and it will be found incidentally not only that historians—in appraising its significance or character—still talk of its supposed "compacts" as actually such, but also that those who avoid references to the "compact" provisions *as* compacts are still dominated in their judgments of the Ordinance by old conceptions of its super-legislative character. The cause of this confusion is, seemingly, a disregard of the difference between a fictional social compact between kings and subjects and compacts supposedly included in an actual historical document. The two matters have manifestly nothing to do with each other, yet literally dozens of writers have treated the Ordinance as though, when assuming compacts to exist, no *evidence* of their existence need be sought—or even alleged to exist. At least one general historian still of national influence definitely cleared his pages of confusion respecting the permanence of the "compact" articles (and a few others of lesser note have done the same). Unfortunately, however, in correcting one error he fell into the greater one of regarding the entire Ordinance as wholly lacking in legal basis,

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not seeing that the "compacts," though mere legislation by Congress, *were* expressions of congressional policy (until changed) on governmental matters of fundamental nature, and also valid restraints upon legislation by territorial assemblies.¹

It is believed that the discussion which follows will show, (1) that the fundamental nature of compacts is still unclear to many historians, or is ignored by them, and that in consequence: (a) the compact *suggestion* in Jefferson's ordinance of 1784 is still considered a great (or the greatest) element in that enactment, although no compacts were made, nor any provision in it assumed to be a compact as stated; (b) the fame of the Ordinance of 1787 is still generally rested on the ideals of its supposed "compacts"—which, unlike the provisions of 1784, were stated as *being* such, though in fact none was; (c) misconceptions and disagreements exist as to which parts of these two enactments should be considered the "substance" or the "essential" portions of each; with the result that (d) there has been no agreement as to the relative statesmanship of the two enactments as plans for territorial government, nor (e) as to the extent or importance of the borrowings by the later from the earlier plan.

Moreover, (2) the relation between the territorial system and the federal system had two aspects. A territory was wholly outside the federal system; it became a member of that system only when it ceased to be a territory, to be admitted as a state. So far as the writer has discovered, only the second aspect has received attention by historians. Emphasis upon that justifies great praise of the Ordinance's governmental plan in comparison with other colonial systems of times antedating or contemporaneous with its adoption. Attention to the other aspect requires a very great attenuation of that praise when the Ordinance's provisions are tested by national ideals strongly predominant in 1787 and by developments in foreign colonial systems after 1787.

Finally, historians, so far as the writer has been able to discover, (3) have not given adequate attention (a) to the relation of Jefferson's plan to Revolutionary principles and backwoods practices in state-making; nor on the other hand (b) to the essentially reactionary character of the Ordinance of 1787 if tested by those principles and practices (though here there are some exceptions); nor (c) to the fact that, so far as regarded territorial government, Jefferson's ordinance

¹ E. Channing, *A History of the United States*, 3 (1912): 548; *post* n. 200.

was repealed in order to substitute for it a plan of literally antithetic character, as undemocratic and centralized as it was feasible to secure, although not so extreme as its framers desired; nor (d) to the reasons that motivated the abandonment of one plan and adoption of the other; nor (e) to the differences of opinion in committee (for it was not merely the debility and procrastination of Congress) which delayed the preparation of the Ordinance in its final form; nor, finally, (f) to the question whether the reasons that motivated the abandonment of Jefferson's plan were reasonable—and the reactionary character of the government established in 1787 therefore justifiable—under the circumstances of that day.

However unsatisfactorily these questions may be dealt with in the discussion that follows, they will not be ignored.

I

No generalization on, or assumption regarding, the Ordinance's merits can be adequate unless it distinguishes and separately appraises its assumedly permanent and admittedly transitory provisions. Too often this has not been done.² The merits of the latter provisions have received little critical attention from others than the territorial citizens who suffered from their undemocratic spirit and administrative defects. The reason for this is evident. A knowledge of actual territorial government—of the acts, development, and interrelations of executive, legislative, and judicial departments—is requisite for a dependable appraisal of the Ordinance as a working plan of government. Many have been content merely to state its provisions as though no question of their merits could be involved. To refer to it, when only an incidental reference is called for, as "the beginning" of our territorial legislation is quite proper, but too often it has been lauded as such.³ Merely to be the beginning does not imply even immediate adequacy, much less continuing adequacy or greatness. On the other hand, when judgments have been passed upon the Ordinance's governmental plan they have very rarely been systematic. Sometimes

² This is true even of Mr. D. G. McCarty's monograph, *The Territorial Governors of the Old Northwest* (1910), notwithstanding that Mr. Paxson has justifiably referred to it as "one of the few attempts to analyze American colonial policy"—F. L. Paxson, *History of the American Frontier* (1924), 72 n. 2; and that it evidences excellent research.

³ See *post* nn. 180, 201 for comments on statements by George Elliott Howard.

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they have been in defense of some individual territorial officer with respect to some particular conflict of official authority in the nonrepresentative stage of government, without recognition of the fact that continual conflicts were due to the Ordinance's imperfect distribution of powers. Sometimes they have been in justification of some particular instance of popular discontent, though this was a chronic malady of the territorial system and due to the Ordinance's illiberal spirit.

The ordinances of 1784 and 1787, considered together, had a long legislative history. The first was wholly displaced, and in provisions for local government repudiated, by the latter. Even this, though it received prolonged consideration, was unsatisfactorily drafted, the long delay in its preparation being possibly due in part to the preoccupation of Congress with other business, but mainly to lack of a quorum for business and to committee disagreements on vital provisions.⁴ It is here essential to emphasize the relations of the two statutes to each other and the fundamental differences between them.

⁴ Mr. Burnett has remarked of the legislative proceedings relative to the organization of government for the frontier settlements that "congress appears to have long been strangely apathetic on the subject, at least to have exhibited an astonishing lack of activity"—E. C. Burnett, ed., *Letters of Members of the Continental Congress* (1921-1936), 8: x. The differences of opinion in the committee, coupled with the periods when there was no quorum in Congress and report and debate were therefore impracticable, seem probably sufficient to account for the delay.

Rather full historical accounts of the later statute are those of J. A. Barrett, *The Evolution of the Ordinance of 1787, with an Account of the Earlier Plans for the Government of the Northwest Territory* (1891), embodying much excellent research, the usefulness of which is somewhat impaired by the fact that the primary sources cited by it have been displaced by the Library of Congress edition of the *Journals of the Continental Congress*; and of J. M. Merriam, *The Legislative History of the Ordinance of 1787*. American Antiquarian Society, *Proceedings*, new series, V (1888): 303. Far the most critical and best discussion of the Ordinance's origins and policy is in J. P. Dunn's *Indiana: a Redemption from Slavery* (1888), 177-260. Mr. Dunn made acknowledgments (*ibid.* 211 n. 1) to the article of W. F. Poole, "Dr. Cutler and the Ordinance of 1787" (1876) in *North American Review*, 122: 229, as "by far the most valuable study of the Ordinance" published before he wrote—as did President Hinsdale; the former adding, "with possibly the exception of Mr. Force's publication . . . of Aug. 6, 1847," which was the first account written with knowledge of a considerable part of then unpublished and relatively inaccessible sources. In 1888 an important source appeared: W. P. and J. P. Cutler, *Life, Journals and Correspondence of Rev. Manasseh Cutler* (2 vol.), which Dr. Poole had used in manuscript. This supplemented W. H. Smith, ed., *The St. Clair Papers* (2 vol. 1882). Peter Force's sketch, "The Ordinance of 1787, and Its History," is republished in the last two publications—in Cutler, 2: 407-27; and in St. Clair, 2: 603-18. B. A. Hinsdale, *The Old Northwest* (1888), is a very excellent book. Dr. Poole, in an article of 1873 followed by that above cited of

Jefferson's plan was remarkable (particularly in connection with the draft provision abolishing slavery, which was rejected) in applying to all the federal territory, north and south of the Ohio. It provided: (1) That the territory ceded by individual states to the Confederation should⁵ be organized into "distinct states." (2) That "the settlers"—without reference to their number, or other conditions—in any one of such "states" should, "either on their own petition or on the order of Congress," receive authority⁶ for their free males of full age to establish, *pending* attainment of a population in such "state" of twenty thousand free inhabitants, a "*temporary*" government, organized under the constitution and laws of any one of the original states which should be adopted for that purpose—"so that such laws nevertheless shall be subject to alteration by their ordinary legislature; and to erect, subject to a like alteration, counties, townships, or other divisions, for the election of members for their legislature." (3) That when the free inhabitants of any "state" should number twenty thousand, upon giving due proof thereof to Congress they should receive from it authority to establish a *permanent* constitution and government for themselves." (4) That such "new states" should be subject under both temporary and permanent governments⁷ to the *conditions* that their constitutions be "republican"; that they forever remain "part of this confederacy of the United States,"⁸ sharing responsibility for its debts; that they be subject "to the Articles of

1876, had used quite uncritically the Cutler *Journals*. The appearance in 1888 of four important works essential to a study of the Ordinance's origin and operation doubtless stimulated Dr. Poole to return to the subject in his presidential address of Dec. 1888 before the American Historical Association—see its *Papers*, 3: 287-94; his remarks contain various errors of fact, and as a whole constitute an extreme championship of Dr. Cutler as respects contributions to the writing of the Ordinance; his views on various crucial points are wholly without supporting evidence.

⁵ In every case where "should" is used in this summary of the statute the original was imperative—"shall." See the next note.

⁶ Nevertheless, on April 21 Jefferson seconded a motion by Elbridge Gerry (which was lost) in which the words were altered to read, "authority may be given by Congress"—*Jour. Cont. Cong.* 26: 255. Jefferson may not, therefore, have meant to give his own original word "shall" its literal emphasis. However, the motion was presumably (almost certainly) lost because it would have substituted for "free males of full age" the words "free males of full age, being citizens of the United States."

⁷ The Congress refused to strike out the words "temporary and" from the clause: "Provided the temporary and permanent governments be established on these principles," etc.—April 20, 1784, *Jour. Cont. Cong.* 26: 249. See *post* ccxcv-vi.

⁸ This is, geographically; *post* ccxciv.

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Confederation in all those cases in which the original states shall be so subject,⁹ and to all the acts and ordinances of the United States in Congress assembled, conformable thereto";¹⁰ that they abstain from interference "with the primary disposal of the soil" by Congress; that they impose no tax on lands owned by the United States; and that until after admission of "any new State" to a vote by its dele-

⁹ The wording of the original report had been, "That in their persons, property and territory they shall be subject" (etc. as quoted in the text)—*Jour. Cont. Cong.* 26: 119. In the draft as finally adopted, without preliminary action revealed in the *Journals*, the words "in their persons, property and territory" were omitted—*ibid.* 277, 279 n. 1. The reason for this omission was, no doubt, the fact that the Articles of Confederation in no way directly affected the inhabitants of the confederated states "in their persons, property and territory." However, as respects Jefferson's new "states" (territories) the power to control their inhabitants in their persons and property had just been introduced into the Articles by their implied amendment to permit establishment by Congress of territorial government (*ante* lxxxiv *seq.*), and under that power the "compact" articles of the Ordinance were also valid legislation (subject to the question of the correctness or incorrectness of the second decision made in *Dred Scott v. Sandford*, which decision has been discussed *ante* cxxx *seq.*). The powers of the federal government under the new Constitution of 1788 did affect the inhabitants of the federated states in their persons and property.

In 1784 the proper amendment of Jefferson's original provision would have been to omit the reference to the original states and *retain* the grant of power over the persons and property of the territorial inhabitants. It seems evident that the majority of Congress were unconscious of the amendment just made effective by the final act of Virginia's cession, and likewise evident that when the words in question were omitted no one foresaw such possible future amendments of the Articles as would strengthen the Union at the expense of the states. But the situation was very different in the summer of 1787, and consequently the corresponding provision of the Ordinance of 1787 reads: "subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made."

¹⁰ This was the final reading—*Jour. Cont. Cong.* 26: 277. The original report of March 1 (1784) had read, "subject to the government of the United States in Congress assembled, and to the Articles of Confederation in all those cases in which the original states shall be so subject"—*ibid.* 119. Although, as punctuated, the limitation to "cases in which the original States shall be so subject" applied solely to subjection of new "states" to the Articles, not to *government* of the territory by the united states (and quite correctly, since the original states were nowise subject to *government* by their fellows), it seems probable that removal of doubt on this point was the reason for striking out, on April 20, the words "to the government of the United States in Congress assembled"—*ibid.* 240. Jefferson voted with the majority. It does not appear just when the last sixteen words of the law in final form (as quoted in the text) were added—*ibid.* 277, 279 n. 1. On the other hand some members of Congress may then have doubted the power of the states united in Congress to set up over the territory, under the Articles, *any* "government" that affected individuals—just as Calhoun and Taney later doubted the existence of such power of the Congress under the Constitution (*ante* at notecall 135 of Sec. II). This possibility is latent in the final wording quoted in the text.

gates in Congress, lands therein of nonresident private owners should not be taxed higher than lands of residents.¹¹ (5) That when the number of free inhabitants "of any of the said States" should equal that of the then least populous of the original states, such "state" should be admitted "into the Congress" as an equal of the original states; and until such admission, "any of the said states, after the establishment of their temporary government, [should] have authority to keep a member in Congress, with a right of debating but not of voting." (6) Finally, by an amendment made at the last moment power was given to Congress to adopt "measures . . . necessary for the preservation of peace and good order" within the "said new States" until the establishment of a temporary government therein.¹²

It will be noted that this whole plan assumes a power in Congress to govern and impose conditions of a political nature upon inhabitants of the territories while such (and would have assumed a power to regulate personal status had Jefferson's slavery provision been passed) but did *not* purport to bind the inhabitants after admission to the Union.

Certainly the statute was summary, and might be regarded as incomplete from a modern point of view.¹³ It did not provide in detail how each of the two territorial governments, temporary and permanent, should be framed, but merely (as respected the former only) that the territory's adult free males should "meet together" to establish it. But it was very sensible for the members of Congress to leave these details (immediately under Jefferson's ordinance, after much longer delay under that of 1787) to their fellow citizens of the western territories. Englishmen and Americans had for centuries been doing such things instinctively, as perhaps every member of Congress knew.¹⁴

¹¹ This was not in the original draft (of March 24) of Jefferson's ordinance but originated in a motion by Elbridge Gerry, seconded by Jefferson, of April 21, 1784—*Jour. Cont. Cong.* 26: 257-59; and was retained in the final draft of April 23—*ibid.* 279 n. 1. It was introduced into the Ordinance of 1787 on July 11, two days before the latter's adoption in final form—*ibid.* 32: 281 n. 1, 319.

All of the seven preceding conditions of the law of 1784 except the first were incorporated into the fourth compact article of 1787. See *post* n. 370 and text at ccxcv-vi.

¹² *Ibid.* 274-75, 278; cf. 259. The motion was offered by Elbridge Gerry.

¹³ Compare the later legislation on subject as illustrated in the provisions regarding Wyoming (act of July 25, 1868, secs. 4-5, *U. S. Stat. at Large*, 15: 178) and Oklahoma (act of May 2, 1890, secs. 4-5, *ibid.* 26: 81).

¹⁴ C. Lobingier's *The People's Law* (1909) contains examples from the

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It is indispensable, also, to remember that the provision for the organization of a temporary government, under the constitution and laws of an original state adopted for that purpose, made it quite unnecessary to deal in Jefferson's ordinance with details of governmental organization.¹⁵ In the Ordinance of 1787 these were very full. They included provisions for a governor and secretary, legislature, and court, and military establishment in the territory. They included also provisions relating to dower, decedents' estates, wills, conveyances of land, and the recording of these last. All this was merely *unnecessary* in Jefferson's ordinance.

But another and primary characteristic of the later ordinance was *impossible* under Jefferson's plan, being diametrically opposed to the latter's spirit and provisions. Those provisions gave the fullest possible play to self-government in local affairs. They were wholly consonant with the principles for which the Revolution had been fought. They conceded to prospective settlers of the border the same rights which the common people were exercising in the original states, and there¹⁶ "the legislatures were in the hands of the radical revolutionaries, or extreme Whigs."

On the other hand the Ordinance of 1787 established a governmental system unknown in any of the original states, irreconcilable with the principles of Anglo-American political doctrine, particularly repugnant to those of our Revolutionary era then just ending. This system was one of government in two stages, the first being one of astoundingly illiberal and tutelary character, in which there was no popular legislature and the governor was a federal appointee who headed the military establishment, appointed all officers of civil government from townships upward, and with the federally appointed judges constituted a legislature. At the same time, with an insouciance characteristic of Anglo-American practice in political compromises, the Ordinance—"for extending the fundamental principles of

colonial period (68-136), the Revolutionary era (137-87), etc. For an instance from Bermuda see T. M. Dill, "Colonial Development of the Common Law" (1924), in *Law Quarterly Review*, 40: 227. See *post* at notecall 276 *seq.*

¹⁵ A mere comparison of the length of different portions of the governmental provisions of the two ordinances, such as Nathan Dane made in defense of his originality, was not necessarily a satisfactory measure of that quality. In fact, however, Dane's plan was only in very small part taken from Jefferson's so that such a comparison worked no injustice.

¹⁶ J. F. Jameson, *The American Revolution Considered as a Social Movement* (1926), 55.

Civil . . . liberty," and to "fix and establish those principles as the basis of all laws, constitutions and governments which *forever hereafter* shall be formed in the said Territory"—proceeded to proclaim in supposedly unalterable "compact" articles various great principles of our system of civil liberty¹⁷ *other than those liberties which insure popular control of government, and which therefore safeguard all other liberties*. That was a truth spread the length and breadth of the land in John Dickinson's *Letters from a Farmer*;¹⁸ so much a commonplace of the Revolutionary era that any inobservance of it must have been instantly and universally recognized as deliberate. But the Ordinance did disregard it.

Writers of high merit have said that Jefferson's ordinance¹⁹ was not actually a governmental plan; that it was in fact, and purported to be, of "constitutional" character. As used, this seemingly meant that Jefferson's plan made no provision for immediate government, that it was merely of prospective application. Mr. Dunn, a lawyer and a good historian, stated those views explicitly:

Mr. Jefferson's resolution or ordinance is not a plan for temporary government at all, and was not so considered by Congress. It provided a mode by which the people of the West might adopt a temporary government, but no provision was made for the intervening time *until* an amendment was adopted, by which Congress was authorized to take necessary action "for the preservation of peace and good order among the settlers." *It was purely constitutional*. It fixed the limits within which the local governments must act, but left the creation of those governments wholly to the future.²⁰

Max Farrand echoed these affirmations.²¹ Assuming momentarily

¹⁷ Text in C. E. Carter, ed., *Territorial Papers of the United States* (1934—), 2: 45 *seq.*

¹⁸ "For who are a free people? not those over whom government is reasonably and equitably exercised but those who live under a government, so constitutionally checked and controlled, that proper provision is made against its being otherwise exercised"—John Dickinson, *Letters from a Farmer*. Letter VII.

¹⁹ The final draft is in *Jour. Cont. Cong.* 26: 274-79.

²⁰ Dunn, *Indiana*, 187-88; italics added. Nathan Dane had written: "Mr. Jefferson's resolve, or plan (not ordinance), of April 23d, 1784, is . . . a mere incipient plan, in no manner matured for practice. The Ordinance of July, 1787, . . . is in itself a complete system, and finished for practice. . . . I am surprised Senators Benton and Hayne attempt to place Mr. Jefferson's fame, in any part, on his meagre, inadequate plan of '84"—letter of March 26, 1830 to Webster, Massachusetts Historical Society *Proceedings*, 1867-1869: at 476, 480.

²¹ M. Farrand, *The Legislation of Congress for the Government of the*

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that the first statement of fact made by Mr. Dunn was correct (though it was not), what did he mean by "constitutional"? Since he was a lawyer he could hardly have meant that the plan was such because its application was left wholly to the future; were that so, unnumbered thousands of statutes, presently passed but to become operative or effective at a future date, would be constitutional. Neither did he mean that all the provisions of Jefferson's ordinance would control the states later created, after admission to the Union; for Mr. Dunn elsewhere pointed out that even the supposed "compacts" of the Ordinance of 1787, which purported to do that (as Jefferson's did not²²), could have no such effect.²³ What he meant was that Jefferson's ordinance consisted exclusively of general congressional regulations for local organization of government which were unamendable by territorial legislatures—that is, were binding on them. This is true. Non-lawyers might readily misapprehend Mr. Dunn's ambiguous language.

But let it not be imagined—because all of Jefferson's plan was beyond amendment by a territorial legislature, and some (not all that Mr. Dunn indicated) of the Ordinance of 1787 *was* so amendable—

Organized Territories of the United States, 1789-1895 (1896), 8. In a later book he wrote that "the real reason why the ordinance remained a dead letter was that, while it fixed the limits within which local governments might act, it left the creation of those governments wholly to the future"—*The Fathers of the Constitution* (1921), 71. The explanation is wholly erroneous. Professor Paxson has also stated that "The scheme . . . provided no machinery for organizing the States and no preliminary government before the population became adequate for statehood"—*American Frontier*, 63. Whatever meaning be here given to "States" and "statehood" both of these statements are inaccurate.

²² It specifically provided "that both the temporary and permanent governments" *which preceded* admission to the Union should be established on the principles stated *ante* following notecall 7. Jefferson's intended compacts were probably limited to them—*post* n. 53.

²³ "The theory that any law-making power can establish an unalterable rule, binding on its successors of equal power, has long since been exploded. That one could make a law binding on a superior power, such as the Ordinance would have been under this theory, is *a fortiori* impossible. It is well settled by the decisions that the Ordinance was abrogated in each state by the adoption of a constitution, and that thereafter it did not exist . . . unless reenacted by the state"—*Indiana*, 250.

Mr. Dunn was here discussing the slavery "compact"; the "law-making power" is Congress. To spell out what he nowhere bothered to say: (a) Congress could not bind itself by the Ordinance not to amend or revoke it at will—it did amend it; (b) the future states of the Northwest were not bound; (c) of course the original states were not bound by a law of Congress—there *were* no compacts by them.

that territorial legislative powers were less under the earlier ordinance. Its provisions were unamendable, but set up a *local government of virtually immediate and almost unlimited powers of self-government*. The only limitations set by it on territorial action were few, and dictated by the relations between the territory and the Confederation, and all these limitations (save one) were likewise imposed by the Ordinance of 1787.²⁴ Legislation under the latter was also subject to "the principles and [compact] Articles" of that instrument—to the latter, of course, very desirably so—and to an absolute power of veto in the governor.

Returning now to Mr. Dunn's first statement of fact,—that Jefferson's ordinance made no provision for immediate territorial government—the truth is that its provision therefor was complete. It will be seen that the settlers on the western borders were quite ready, and entirely competent, to organize under its provisions.²⁵ Of course, the actual initiation of territorial administration was dependent upon the appropriation of money, but this was equally true of the Ordinance of 1787. The difference was that in the case of the latter Congress did take the necessary supplementary action because the time was ripe; in the case of Jefferson's ordinance various conditions made such action impossible.

The facts are patent on the record, and have been correctly stated by various writers of authority, including long ago Senator Benton and George Ticknor Curtis.²⁶ Jefferson's report was ordered by Congress, framed, and approved as a "plan for the temporary government of the Western territory."²⁷ It is true that *until* amended in debate before its passage, as stated by Mr. Dunn, it made *no* provision for immediate government of the settlers; the initiation of such

²⁴ *Post* n. 370.

²⁵ *Post* cccxlix-l.

²⁶ Senator Benton was as extreme in his claims for Jefferson's ordinance as Dane was niggardly in his recognition of it—T. H. Benton, *Historical and Legal Examination of . . . the Dred Scott Case* (1857), 42. George Ticknor Curtis justly remarked that at first the ordinance even undertook to regulate individual rights by prohibiting slavery; but that prohibition being removed, the statute became "a mere provision for the political organization of temporary and permanent governments of States," the regulation of those rights *being left to the settlers themselves* in adopting for their pre-admission government the constitution and laws of any one of the original States—*Constitutional History of the United States* (2 vol. 1857-1858), 2: 343-44.

²⁷ *Jour. Cont. Cong.* 26: 118, 246 seq., 275-79.

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government was made dependent on petition by them and approval by Congress, or an independent action by Congress.²⁸ It is also true that even with that amendment the report did not submit detailed provisions to be immediately approved by Congress for initiation of such government; the amendment provided merely that, either on their own petition or by order of Congress, the settlers should receive authority to initiate government.²⁹ With this provision included, the ordinance was clearly a plan for government of the territory in all stages of its settlement. The omission of detailed provisions for immediate government was in fact good sense; there were also good reasons why none could then have been instituted and the time when such action would become practicable was uncertain. Nor was the ordinance any less than a complete and feasible administrative plan because one of its general principles made it impossible to impose any details of government beyond the first short stage; since these would depend upon the settlers' choice of the state under whose laws they desired to live pending organization under their own constitutions.

Jefferson's ordinance was, then, a complete and workable plan for the government of a specific territory. It was precisely that—but at the same time it was, *by implication*, something more; namely, an enunciation of general principles of government which were judged proper to control the administration of all federal territory, the plan being drawn to cover all that the Union then held. But its principles—not being *made* interstate compacts (as *suggested* in the words retained from Jefferson's draft in the final enactment)—were nevertheless mere legislation, and “constitutional” only in the peculiar sense above explained. There is nothing to justify an assumption that anybody contemplated varying plans for different districts. Common sense suggested that a plan suitable for one would be suitable for others; and (with the elimination of a prohibition of slavery deemed undesirable for the Southwest) Congress, by adopting the ordinance, expressed that view.

Nor was there any difference in this respect between Jefferson's plan and that of 1787. Monroe's committee, in preparing the substitute plan that became the Ordinance of 1787, and Nathan Dane in giving this final form, did not refer to any other than the Northwest

²⁸ *Ibid.* 274.

²⁹ *Ibid.* 276.

Territory, but no doubt it was considered proper for application to other territories. In fact, with the exception of its prohibition of slavery it was extended to the Southwest Territory and to some other slaveholding territories, and without that exception was extended to various free territories.³⁰ It is interesting that Jefferson believed that Congress agreed to his plan precisely *because* of the liberality with which he construed his instructions.³¹

The distinction made by Mr. Dunn between the two ordinances—that Jefferson's was "wholly" constitutional and the other "constitutional as to its articles of compact, and merely statutory as to the remainder"³²—was seemingly thought to have significance as a criticism of the former. It certainly is of no significance in that respect, if it is in any. As regards what the framers of the two instruments intended, there was this difference: that in both cases they wanted compacts that would be of constitutional character in the sense that they would bind states; that in neither case were the provisions made compacts; that Jefferson almost certainly realized this,³³ and Dane too;³⁴ but in the case of the later ordinance, since it declared some of its provisions to be compacts many persons believed them to be such. In reality there was in this respect no difference between the two statutes. Each was of purely statutory character, binding upon the territory—or "constitutional" as respected it—so long as unmodified or unrepealed. The differences in length and form are of course unimportant. The essential difference is the vastly greater measure of self-government allowed by Jefferson's plan.

It has also been stated in various excellent books that Jefferson's ordinance never became law; or in Nathan Dane's words was not an ordinance.³⁵ This is an egregious and manifest error. The "plan"

³⁰ See *ante* n. 69 of Sec. III. Dr. Farrand, *ante* n. 21, pointed out that the Ordinance of 1787 was "evidently intended or at any rate eminently fitted" for application to other territories than that northwest of the Ohio—*Legislation for the Territories*, 16.

³¹ He wrote to Madison on April 25, 1784: "they [the Congress] have agreed to it, because it extends not only to the territory ceded but *to be ceded*. and shews how and when they [new States] shall be taken into the union"—*Writings* (Ford ed.), 3: 470. The committee's liberal understanding of its duties seems to be reflected in David Howell's words, *post* n. 53.

³² *Indiana*, 188.

³³ *Post*, text at notecall 54 to 55, and those notes; also note 135.

³⁴ *Ibid*.

³⁵ For example: F. A. Ogg, *The Opening of the Mississippi* (1904), 406; A. Nevins, *The American States . . . 1775-1789* (1924), 596; N. Dane,

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was formally approved by Congress; its "repeal" was recommended by Monroe's committee in reporting their own new "plan" of temporary government for the same territory, and was finally effected by the adoption of the new plan on July 13, 1787.³⁶ The second plan acquired in its late legislative stages the title "ordinance,"³⁷ which Jefferson's never did, but that is of no significance; both "plans" were bills until adopted, and when approved were ordained. Jefferson's was law, and was an ordinance for more than three years.

In one sense, however, it is quite true that as Mr. Hicks has said Jefferson's ordinance "was purely preliminary and tentative."³⁸ It was not intended to be of that nature, but as events turned out it proved to be such. The original report was made on the same day that Virginia actually ceded to the Confederation her western lands. Thousands of unruly squatters were pouring rapidly beyond the old frontiers of settlement. From the old French settlements in Indiana and Illinois came clamorous demands for an effective government of law and order. Practical and prompt action by Congress was manifestly desirable. Jefferson's ordinance advanced Congress not at all toward that practical objective, for no territory was organized under its provisions; the abortive attempt to organize the State of Franklin was the only action attempted under them. But the fact that it remained practically a dead letter was due predominantly to external conditions; not to anything in the plan that made its immediate application impracticable.

The subject presented very great difficulties from the beginning.³⁹ No territory could have been organized for a considerable time because of the confusion of ideas and the conflicting interests which impeded decisions in Congress. Many members of Congress, and leaders outside of it—nobody more than Washington—were opposed to settlement in

General Abridgment and Digest of American Law with Occasional Notes and Comments (8 vol. 1823-1824; vol. 9, 1829, with app. 1830), 9 (app.): 74.

³⁶ *Jour. Cont. Cong.* 26: 279, 30: 255, 32: 343.

³⁷ On May 9, 1787—*ibid.* 32: 274, retaining that title thereafter. Irving Brant states that the first action of Congress called an "ordinance" was of March 27, 1781 relating to the capture and condemnation of prizes—*Life of James Madison*, 2 (1948): 111; *Jour. Cont. Cong.* 19: 314. It is possible that system supposedly guided use of the word, but certainly no distinction could be made between the two governmental plans of 1784 and 1787.

³⁸ J. D. Hicks, *The Federal Union* (1937), 178.

³⁹ See letters of David Howell (member of the Jefferson committee), Feb. 1 and Feb. 21, 1784; of Jefferson to Madison, April 25, 1784; of W. Grayson to Washington, May 8, 1785—Burnett, *Letters*, 7: 427, 451, 499; 8: 118.

the manner in which it was actually proceeding;⁴⁰ that is, "in an irregular and loose manner."⁴¹ They entertained the idea that particular districts of the western country should and could be successively settled and admitted as states. This was the plan of Congress throughout 1783, and it was a committee recommendation that government be speedily established "in such District thereof as shall be judged most convenient for immediate settlement and cultivation"⁴² which led to the appointment of Jefferson's committee to prepare a

⁴⁰ In the beginning the government was disposed to eject squatters from the Northwest Territory until settlement should be authorized; General Harmar expelled large numbers in the spring of 1785—Smith, *St. Clair Papers*, 2: 3 seq. 20. But they were far too numerous to be so dealt with successfully. In 1783 there were, in Dr. Jameson's opinion, "probably twenty-five thousand" settlers west of the Alleghenies; in Kentucky alone, in 1785, an estimated 20,000 to 30,000—*The Revolution Considered as a Social Movement* (1926), 68, 69. Professor Channing estimated the total cross-mountain population in 1790, north and south of the Ohio, at 110,000, certainly not exceeding 125,000—*History*, 3: 528. Squatters had good reason to feel that despite their unauthorized settlement they would be well cared for; there had been much colonial legislation in favor of them as pre-emptioners.

⁴¹ See Washington's letters of June 17, 1783 to the President of Congress, of Sept. 7, 1783 to James Duane, and of March 15, 1785 to Hugh Williamson in his *Writings* (Fitzpatrick ed.), under those dates. The greatest cause of delay was the difficulty of choosing between competing modes of sale; see, in addition to the above letters, Grayson to Washington, April 15, 1785, Burnett, *Letters*, 8: 95; Grayson to Pickering, April 27, 1785 in O. Pickering and C. W. Upham, *Life of Timothy Pickering* (4 vol. 1867-1873), 1: 511; R. King to Pickering, May 30, 1785, C. R. King, *Life and Correspondence of Rufus King*, 7 (1894): 103; Madison to Washington, April 16, 1787, Burnett, *Letters*, 8: 579; Madison to Pendleton, April 22, 1787, *ibid.* 587. And on the working in Kentucky of the system of "indiscriminate location" General Parsons, in a letter of Jan. 7, 1786, after being at the Falls of Ohio, wrote that there were frequently "survey upon survey, in many instances . . . 8 or 9"—C. S. Hall, *Life and Letters of Samuel Holden Parsons* (1905), 480. See also N. S. Shaler, *Kentucky: a Pioneer Commonwealth* (3d ed. 1886), 49-52; L. Collins, *History of Kentucky* (rev. ed. 1877), 633, 813; R. S. Cotterill, *History of Pioneer Kentucky* (1917), 231-33. See also W. E. Peters, *Ohio Lands and Their Subdivisions* (1918), 18-25.

⁴² On June 5, 1783 it was moved (by Mr. Bland, Alexander Hamilton seconding) that the Western Country be divided into various "districts," each of which, when its population should reach 20,000 should "become and ever after be and constitute a separate, Independent free and Sovereign state, and be admitted into the union as such with all the privileges and immunities of those states which now compose the Union"—*Jour. Cont. Cong.* 24: 385. A committee reporting on Sept. 13 1783 "on the Virginia cession" (the anticipated cession) offered a resolution that a committee be appointed to report "the most eligible part" of the territory "without the boundaries of the several states, and within the limits of the United States," "for one or more convenient and independent states"—*ibid.* 25: 558. Another committee, of which Mr. Duane was chairman, reporting a month later, submitted resolutions which are set out *post*, following notecall 97.

governmental plan for such district.⁴³ No doubt such settlement would have lessened the danger of Indian incursions and given greater security against Great Britain, but the rapidity of settlement nullified all plans to control it. William Grayson expressed the opinion that only the importunities of public creditors, and general reluctance to undertake their payment by taxation, made possible any agreement within a short time upon settlement of the territory.⁴⁴ Any authorized migration into it must have waited upon the opening of land offices, and land sales were impossible until Indian titles should be cleared and provisions made for sales. It was necessary, then, to conclude treaties with the Indians, agree upon a district for a first new state, and pass a land law. It soon became evident that settlement could not be directed into and confined to particular districts successively. It was equally clear that, assuming varying densities of settlement in different regions, surveys could not be made of these selectively and independently, but must begin at the eastern edge of the territory and proceed systematically westward. This was the basic assumption of the plan (which established the fundamentals of our system of national survey) drafted by Jefferson as chairman of the committee charged with what he viewed as "the minuter circumstances of selling the ungranted lands." His first report was rejected by Congress, thus of itself rendering the governmental ordinance equally ineffective. It was passed in altered form in 1785.⁴⁵ It was high time for such action; legitimate

⁴³ On April 9, 1783 a motion was adopted for appointment of a committee to report "the measures proper to be taken with respect to the Western Country"—*Jour. Cont. Cong.* 25: 955, 957. On Dec. 18, 1783 a committee on regulation of Indian trade was renewed "and the matter, together with the plan for the temporary government of the western territory was referred" to Jefferson and others—*ibid.* 25: 693 n. 1. On Jan. 3, 1784 Jefferson reported on Indian treaties—*ibid.* 26: 5; and on March 1, 1784 he reported his governmental plan—*ibid.* 26: 118.

⁴⁴ Letter cited *ante* n. 39. See Herbert B. Adams, "Maryland's Influence upon Land Cessions to the United States," in Johns Hopkins University *Studies in Historical and Political Science*, 3 (1885): no. 1; M. Egleston, "The Land System of New England," Johns Hopkins *Studies in Hist. and Pol. Sci.* 4 (1886): nos. xi-xii; H. L. Osgood, *American Colonies in the Seventeenth Century*, 1 (1904): ch. 4; A. C. Ford, "Colonial Precedents of Our National Land System as It Existed in 1900," Wisconsin University *Bulletin: History Series*, 2 (1910): no. 2. The views of Peletiah Webster (1781), which were spun of pure theory and utterly devoid of practical realization, are reprinted in A. B. Hulbert, *Ohio in the Time of the Confederation* (1918), 17-29.

⁴⁵ See the law in Carter, *Territorial Papers*, 2: 12 with editorial notes. Jefferson's first draft of the land ordinance of May 20, 1785 provided for surveys only after purchase from the Indians and creation of states; the

doubts existed whether the hour was not already too late for enforcement of any system of orderly sales in advance (or confirmation) of settlement.⁴⁶

Two years passed, after the land ordinance was out of the way, before a governmental plan was available in the Ordinance of 1787. A stable government was thereby assured; one that would maintain order and protect investments. However much the sale of federal lands might reduce the value of their own backlands,⁴⁷ and however much the admission of new western states might lessen their own political power, all the old states had come to realize that migration to the West was wholly beyond control, and that both land sales and new states were, all things considered, desirable. The East was satisfied with the plan for frontier government; it had secured a qualified prohibition of slavery and the South had received a satisfactory *quid pro quo*.⁴⁸ The completion of both the land and the governmental ordinances, and particularly the compromises made in the first,⁴⁹

latter disappeared before the final revision—*Jour. Cont. Cong.* 27: 446 and Carter for final law.

⁴⁶ Washington wrote to Richard Henry Lee: "A little longer and that country would have been settled maugre all that could have been done to prevent it; as it is I am not clear that the same respect will be paid *now* to this Ordinance, which would have been at an earlier period, before men began to speculate in Lands No. West of the Ohio and to obtrude themselves thereon"—June 22, 1785, Burnett, *Letters*, 8: 111 n. 2. See also Washington to Grayson, Aug. 22, 1785 and July 26, 1786 in his *Writings* (Fitzpatrick ed.) under those dates. On April 25, 1787 a committee of Congress, commenting on the slow progress of surveying, reported: "The loss of lands is seriously to be apprehended, unless early measures are passed for Vesting a better kind of people with rights there"—*Jour. Cont. Cong.* 32: 239.

⁴⁷ Ownership of these had not prevented agreement on acquisition of a national domain to pay the Revolutionary debt and did not prevent agreement on the land ordinance. But its influence in retarding the latter was suspected—R. Putnam to Washington, April 5, 1784, Cutler, *Manasseh Cutler*, 1: 136; reply of June 2 in Washington, *Writings* (Fitzpatrick ed.), 27: 411. The same suspicion entered later into the last stages in the preparation of the Ordinance of 1787—See Madison to Washington, April 16, 1787, Burnett, *Letters*, 8: 579.

When the Ordinance had been passed the Massachusetts delegates wrote to Governor Hancock: "It has been a Question, with the Eastern Delegates especially, whether peopling those new regions with emigrants from the old States, may not, in point of view, be a disadvantage to them. But it has been found, that those new lands are very inviting to settlers, and that, if not regularly disposed of and governed by the union, they will in a very few years, probably, be . . . settled in an irregular manner, and perhaps at no less expence of Inhabitants to the old States"—letter of May 27, 1788—Burnett, *Letters*, 8: 740. It will be noted that there is here no reference to loss in sales of land.

⁴⁸ *Ante* n. 22 of Sec. III.

⁴⁹ The main compromise, after giving preference to township over in-

meant that squatter settlement and individual speculation could be replaced by collective speculation and some control of settlement. "We have at last," wrote Edward Carrington, "made a brake into the Western Lands."⁵⁰ But although there was this actual conjunction of land hunger and humanitarianism, it will be shown below that the adoption of the Ordinance of 1787 was not (as it has often been said to have been) dependent upon that conjunction.

The above conditions of external fact, of themselves, had necessarily made a dead letter of Jefferson's plan of government. But there concurred in that effect other causes that were not external to it. Some sprang from positive provisions of the plan, and others were inherent in its general nature.

One supposed defect of the latter character—that it provided no plan of actual government—would have been of the gravest importance if it had actually existed, but it has been seen that it did not.

Another supposedly grave defect was attributed to it. Before stating this, emphasis should be given to the fact that the legal effectiveness of the ordinance is not here primarily in question, although incidentally involved. Under the writer's theory that the Articles had been impliedly amended, Congress had the power under them to establish governments in the Northwest; and, that power not being qualified, it could exclude slavery or declare fundamental political rights. But although the sovereign states could have done these things *outside* the Articles, as under the theory of Chief Justice Taney they did, they could have done them only by agreement (compact), and if done through Congress as their common agent the delegates of each (whose general powers, stated in the Articles, did not cover the situation) must have had special instructions from their respective states; and such, of course, had not been actually given. For this reason, already emphasized, his theory becomes unavailable.⁵¹

The next alleged defect of the ordinance, then, was that indicated by Mr. Dunn—that it did not even purport to be final action, even

discriminate-location surveys, was to sell land in one tier by whole townships and in the next tier by sections, alternately. Washington commented on the views compromised: "Both sides are sure, and the event is appealed to, let time decide it. It is however to be regretted that local politics and self-interested views obtrude themselves into every measure of public utility"—letter of July 25, 1785 in his *Writings* (Fitzpatrick ed.), 28: 204.

⁵⁰ Aug. 7, 1787 to Monroe—Burnett, *Letters*. 8: 631.

⁵¹ *Ante* xci.

as a declaration of basic or "constitutional" character.⁵² The only discernible rational basis for such a criticism is the fact that the ordinance provided that "the preceding articles"—which meant, possibly, all its provisions, but was most probably intended to be limited in meaning—"shall be formed into a charter of compact; shall be duly executed by the President of . . . the Congress . . .; shall be promulgated; and shall stand as fundamental constitutions between the thirteen original states, and each of the several states now newly described" in the ordinance.⁵³ These words, which were Jefferson's own, might indicate a doubt of Congress' power to act, independently of special compacts between the states. But was it his understanding that such compacts should first be made, and *afterward* executed and promulgated? Or did he understand that a declaration by Congress that the provisions "should be" compacts (ignoring the *form* of charter), accompanied by the solemnity of execution and promulgation, would *make* them compacts? It is quite impossible to say; although—having signed for Virginia the deed by which she ceded the territory, on conditions therein explicitly stated and by

⁵² Mr. Dunn wrote: "The entire resolution . . . was to be 'a charter of compact,' but it was not to be unalterable"—namely, by *Congress*—"until the sale of lands by the United States was begun, and that sale Congress was not yet ready for"—*Indiana*, 188. Now, Mr. Dunn was clear that the ordinance was law for three years. Then, (1) as a lawyer he knew that every mere statute lacks finality in being immediately and forever alterable. Hence, (2) he seemingly *here* regarded the *entire* ordinance (see next note) as already a compact (see n. 123 of Sec. II) although temporarily alterable. Compare other statements commented on *ante* cclxii. Even had it been a compact he would have had no point, since he overlooked the fact that this alterability was a term of the compact itself—a provision of the ordinance. But since there were no compacts there was no defect in the ordinance in the sense here in question.

⁵³ *Jour. Cont. Cong.* 26: 278; he had used the same words in his original report—*ibid.* 120. In David Howell's letter of Feb. 21 (when the terms of the ordinance had obviously in very large part, at least, already been agreed upon in committee) he wrote: "The committee have also agreed to report that the *new states* be laid off under the following *express stipulations* or perpetual covenants betwixt them and the present states"—W. R. Staples, *Rhode Island in the Continental Congress* (1870), 480;—namely, nos. 2, 3, and (in effect) 4 of the seven conditions enumerated *ante* following notecall 7, and in addition the prohibitions of slavery and hereditary titles which Congress failed to approve. Now, since three conditions were added before March 1, and one of the above modified, it is *possible* (a) that Howell misconceived the committee's prior vote or (b) that it was changed. It seems more likely, however, that Jefferson intended only his seven numbered "principles" (the word "articles" was used solely in the passage quoted in the text) to be made interstate agreements. Jefferson's "*states*" (territories, but present organized entities) could have *made* compacts.

the other confederated states specifically accepted, and all this through delegates in substance and fair construction specially empowered to act—he certainly should have been clear on those points.⁵⁴ The conduct of Congress, in doing nothing to initiate true agreements, would indicate that to it “compacts” were only solemn words, or words and formal acts. It seems fair to say that what little in Jefferson’s writings bears on the subject suggests less confusion than do the acts of Congress, which in 1785 and 1787 simply assumed that merely calling provisions compacts made them such. And although Nathan Dane justly regarded himself as a much better practical lawyer than Jefferson, nevertheless on this matter of compacts comparison favors the latter; for Dane, even after many years for reflection, contended that the “compacts” of the Ordinance of 1787 really were such, although some other things in the record suggest that in doing so he was either disingenuous or inconsistent in this confusion.⁵⁵

⁵⁴ Moreover, it is to be noted that although Jefferson did employ in his political writings, when useful, the social compact theory—see George Burton Adams, “Jefferson and the Social Compact Theory,” in the Amer. Hist. Assoc. Report for 1893, 165 at 173-76—he did not confuse such fictitious compacts with actual legal agreements. Jefferson’s motion and ordinance provision were, that the provisions should be made compacts and (thereafter, as part of the compacts) should be alterable only “by the joint consent of the United States in Congress assembled”—as sufficient agents, made so by this compact, of the sovereign confederated states—and of the particular State within which such alteration is proposed to be made”—*Jour. Cont. Cong.* 26: 278. This again suggests that he was not talking loosely of compacts as men did in political theory. But compare *post* n. 135.

Jefferson wished to control the territories (in his terminology “states”) only before admission to the Confederation—*ante* n. 22. To that end he wanted compacts. To these compacts his “states” could themselves be parties—*ante* ccliv (*aliter* the changing “inhabitants” of a territory as in the Ordinance of 1787), as well as the confederated states. The Ordinance of 1787, however, purported to bind new states *after* their admission to the Union.

⁵⁵ On the actions in Congress see n. 123 of Sec. III. As respects Dane, note that nearly two years after Jefferson’s ordinance was passed, a grand committee of which Monroe and Dane were members recommended the repeal of two resolutions, only, of that instrument; one relating to the number and size of new states, the other the recommendation relating to compacts, here under discussion—March 4, 1786, *Jour. Cont. Cong.* 30: 134. Now, *why* this last particularly? *It seems probable that it was already plain that in any thorough revision of the ordinance compromises would be forced that could never be accepted as true interstate compacts*—compare reference to King’s motion of March 1785 in n. 123 of Sec. III. This problem of the number and size of states remained a primary difficulty—to some, including Jefferson, apparently, the greatest of all difficulties—down to and after the adoption of the Ordinance of 1787. Later, repeal of all Jefferson’s provisions was recommended—May 10, 1786, *ibid.* 255. But the first recommendation seems to indicate that the members of the grand committee, including Dane, knew

Passing now to provisions of Jefferson's plan which were in truth significant when one inquires why it never received actual application, there was one which virtually precluded any organization of new states until it could be removed; but this provision was not Jefferson's. There was another, most distinctly his, which was lost by mere accident in the debate on the ordinance. There were other provisions—also his, and most characteristic of his political philosophy—which in the opinion of those who favored substitution, for his plan, of the Ordinance of 1787, did not provide for local government of adequately stable and orderly character; and the presence of these last provisions in his ordinance was the effective cause of its repeal.

The provision first referred to was one to which Congress had committed itself in 1780. In its proclamation of that year in which it called upon the states to cede to the Confederation their claims to western lands, engaging itself to organize new states from any so acquired, it had stipulated that these states should be of dimensions not less than one hundred nor more than one hundred and fifty miles square. Massachusetts ceded her claims on the basis of this engagement; Virginia did the same, and explicitly embodied in her act the condition just stated.⁵⁶ For this bit of incredibly fatuous legislation by Congress Jefferson was in no degree responsible; but it was necessarily embodied in his ordinance. That also provided that a population equal to that of the least populous of the thirteen original states should be required of any new state as a condition for admission to the Confederation. These two provisions, and particularly their conjunction, caused infinite difficulties.

This obstacle, of itself, compelled some revision even of Jefferson's plan, and once the revision began it raised problems which were the chief subjects of contention until—and indeed after—adoption of the Ordinance of 1787. Attitudes varied extremely toward westward migration as a matter of principle; some, perhaps many, public men—

perfectly well what a true compact was. Inconsistencies in his views of interstate compacts in 1830 can be noted in his *Abridgment*, 9 (app.): para. 2 on p. 15, bottom of 22 and of 24, and secs. 28-32.

⁵⁶ *Jour. Cont. Cong.* 26: 114. Justin Winsor's *The Westward Movement* (1897) reads as though he regarded the restriction as representing Jefferson's personal policy—258, 262. The same is true of Professor Paxson—*American Frontier*, 62-63. The true facts are recited in the report of the grand committee cited *ante* n. 55, at 132.

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including Arthur St. Clair, who was to be the first governor of the West—would have suspended it altogether had such action been possible.⁵⁷ Rufus King regarded every emigrant beyond the Alleghenies as lost to the Union,⁵⁸ and undoubtedly a large part of the eastern creditor classes held that opinion. Such men could not have been interested in accelerating the organization and admission of new states, independently of divergent opinions respecting trans-mountain trade, foreign relations, or the effect of new states on the balance of political power within the Confederation. There was a general fear of dismemberment of the large states and of the admission of new ones.⁵⁹

The first step toward amendment of the compact between Virginia and the Confederation which had resulted from that resolution began with a motion by Monroe to refer to the grand committee, of which he was then a member, "the cessions and divisions of Western lands and territories."⁶⁰ It reported that the division provided for in Jefferson's ordinance, which paid no attention to natural boundaries or the varying character of soil in different regions, was impracticable, and that if a division were made into such small states,

⁵⁷ In debate, Aug. 18, 1786—Burnett, *Letters*, 8: 440.

⁵⁸ Letter of Sept. 3, 1786 to Jonathan Jackson—*ibid.* 8: 458. The same idea, with the qualification "should there be an uninterrupted use of the Mississippi at this time," is stated in King to Gerry, June 4, 1786—*ibid.* 380.

⁵⁹ On Dec. 19, 1785 Monroe wrote from Congress (just after a long trip in the West) to Madison: "I find the most enlighten'd members here fully impressed with the expedience of putting an end to the dismemberment of the old States, doubtful of the propriety of admitting a single new one into the confederacy"—Burnett, *Letters*, 8: 277; compare Monroe to Madison, Dec. 26, *ibid.* 278. John Jay wrote to John Adams about the same time: "The rage for separatism and new States is mischievous; it will, unless checked, scatter our resources, and in every view enfeeble the Union"—Oct. 14, 1785, in W. Jay, *Life of John Jay* (1833), 2: 176. Jefferson was not opposed to Kentucky's independence, and thought that desired in Virginia whenever the ultramontane settlers should "think themselves able to stand alone"—letter of March 24, 1782 to Monroe, *Writings* (Ford ed.), 3: 54; and he deemed a forced connection with the West to be neither in the interest nor within the power of the East—letter of Dec. 16, 1786, *ibid.* 5: 228. Monroe, on the other hand, considered consent to Kentucky's demand for independence to be not only unnecessary but also opposed to the best interests of both Virginia and the western settlements; to those of the former in weakening her influence within the Confederation—letter of Aug. 25, 1785 to Jefferson, Burnett, *Letters*, 8: 203; and to those of the latter in lessening their support in Congress—letter of Jan. 19, 1786 to Jefferson, *ibid.* 286. On the first point see similar views in Grayson to Madison, Aug. 21, 1785—*ibid.* 194; Virginia delegates to Governor Henry, Nov. 7, 1785—*ibid.* 250.

⁶⁰ *Jour. Cont. Cong.* 30: 132.

as compelled by the Virginia compact, "the probability [was] that many of them [would] not soon, if ever" attain the population requisite for admission into the Confederation.⁶¹ This report was immediately referred to a special committee headed by Monroe, and in its report the same objections were emphasized;⁶² after which Congress recommended to Virginia a revision of the condition imposed in her deed of cession, to allow Congress to create not more than five nor less than three states in the territory ceded.⁶³ To this recommendation Virginia acceded only a year and a half after passage of the Ordinance of 1787, which contained that provision; thus curing its invalidity—unless the adoption of the Constitution had done so.⁶⁴

Apparently, this action resulted primarily from Monroe's conviction, derived from a trip westward in 1785, that large areas near the Great Lakes and the Mississippi were "so miserably poor" that they could never maintain any considerable population.⁶⁵ However,

⁶¹ March 24, 1786—*ibid.* 132-33. Both this report and Monroe's report of May 10 (*post* n. 62) recited that Congress had earlier, on an unspecified date, recommended that the ceding "states" (only Virginia was involved) revise their deeds of cession as respected the condition fixing dimensions of new states. Possibly there was no such prior resolution (see Monroe to Madison, Dec. 19, 1785; and to Jefferson, July 16, 1786—Burnett, *Letters*, 8: 277, 403); at all events Congress on July 7, 1786 passed a resolution recommending that Virginia alter the conditions of her cession and give Congress freedom to divide the ceded territory in not more than five nor less than three states—*Jour. Cont. Cong.* 30: 390-94. And this resolution was the basis of Virginia's action of Dec. 30, 1788; see Carter, *Territorial Papers*, 2: 172. Note that this resolution and the two committee reports assumed that formal action of revision was required by only one party to the compact—Virginia; that the other confederated states could be bound by committee reports and votes in Congress. Jefferson had not been guilty of this faulty reasoning in his report of 1784—*ante* n. 54. Monroe described it as "between the U. S. and Virga."—Burnett, *Letters*, 8: 277. It was one between Virginia and her sister sovereign states, but that was not synonymous with the "united states in Congress assembled"—it merely happened that the agents of the several states were also their delegates in Congress, for convenience. Contrast Monroe's exact usage of "a Citizen of one of the United States," "a Citizen of any of the United States," "citizens of the United States or foreigners"—*Jour. Cont. Cong.* 30: 254.

⁶² Committed on March 27, report on May 10, 1786—*Jour. Cont. Cong.* 30: 139 n. 1, 251-52.

⁶³ July 7, 1786—*ibid.* 390-94.

⁶⁴ See *ante* cxcviii; Carter, *Territorial Papers*, 2: 172.

⁶⁵ Hence, would "perhaps never contain a sufficient number of Inhabitants to entitle them to membership in the Confederation" under Jefferson's requirement of a population equal to that of the then least populous of the original states. See his letter of Jan. 19, 1786 to Jefferson—Monroe, *Writings*, 1: 117, or Burnett, *Letters*, 8: 286. His reference to "my several routes westward" is perhaps to several parts of this trip of 1785. In 1784 he had made another trip that took him near Lake Erie—*Writings*, 1: 40-41. The

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increasing knowledge of the West must have given others similar ideas (unless reasoning about political power sufficed to lead them to the same conclusion), since Monroe after returning from his trip reported from New York that "the most enlighten'd members" of Congress were "well inclined to a revision of the compact" respecting division of the territory.⁶⁶ It is notorious that the strength of opinions on these subjects of large or small states and sectional power was extraordinary at that time—and perhaps, despite the disappearance of slavery, still is. But the most remarkable aspect of the strength of these opinions in the 1780's is their purely speculative basis. And in the case of Jefferson, who felt more strongly regarding them than on other matters which he might have been expected to consider far more important,⁶⁷ it is extraordinary that they were the most speculative of all.⁶⁸ In the end Congress exercised its discretion

trip in 1785 was to attend a meeting of commissioners to make a treaty with the Indians—see letter of Aug. 25, 1785 to Jefferson, *Writings*, 1: 107; Burnett, *Letters*, 8: 202; also Monroe, *Writings*, 1: 112.

⁶⁶ Burnett, *Letters*, 8: 277.

⁶⁷ *Post* cccv seq.

⁶⁸ That is, not based on assumptions regarding soil, climate, and crops—nor on reasoning about intangible political influences—but on premises respecting "the nature of things" and the nature of "American character." "In the nature of things," he said, there should be large states on the Atlantic, small in the interior. "Considering American character in general, that of those people particularly," large states "would crumble into little ones," and if they should decide to divide themselves "we are not able to restrain them. They will end by separating from our confederacy & becoming its enemies"—letter to Monroe, July 9, 1786, *Writings* (Ford ed.), 4: 246-48. "A tractable people may be governed in large bodies but in proportion as they depart from this character the extent of their government must be less. We see into what small divisions the Indians are obliged to reduce their societies"—letter of Dec. 16, 1786 to Madison, *ibid.* 227.

Accordingly, in his own governmental plan, contemplating ten tiny states, he gave the inhabitants complete freedom from the beginning—*ante* ccliv-vi; *post* cclxxx-lxxxi.

Jefferson had definite opinions of the character of western people: "I never had any interest westward of the Alleghany; & I never will have any. But I have had great opportunities of knowing the character of the people who inhabit that country"—letter to Madison, Jan. 30, 1787, *Writings* (Ford ed.), 5: 256. His opportunities for learning indirectly of the western country were certainly excellent; and it would be strange if he had not had complete confidence in the basis of his governmental plan. Note the query *post* ccv-vi.

The area of the states in the Old Northwest is now computed at 248,313 square miles, which includes a portion of Wisconsin taken from the Louisiana Purchase. In explaining his fears of only two large states Jefferson assumed an area of 160,000 square miles, "three times as large as Virginia within the Alleghany"—*ibid.* 132. Both figures were exaggerated. The area of all save one of the states actually created is greater than that of Virginia, the largest exceeding it by nearly forty-three per cent.

to create the maximum number of states permissible—five; certainly neither on the basis of Jefferson's theories nor primarily on proved agricultural capacities, without discernible harmful consequences.

The first report by Monroe's committee recommended, as above indicated, a reduction in the number of states but retained Jefferson's population requirement for admission to the Union. This was in accord with Monroe's personal policy. He believed that the new states must be large to offset their supposed infertility. He did not wish, however, to delay, but rather to accelerate their admission, and this was accomplished by requiring the same population for a larger area. However, he also believed that the interests of the frontier states would afford little support to many objectives of the Confederation, and might be opposed to them, and therefore he favored the reduction in their number for the second reason that this would lessen the danger to the original states presented by the power of the new states in Congress.⁶⁹

It is manifest that this reasoning could not have been satisfactory to two classes of Monroe's fellow committeemen: those, if any, who were seriously fearful of *any* loss of power to the Atlantic states, and those who believed that the votes of western states would support in federal divisions the views of another than their own section of the country. There can be little doubt that for these reasons King would have been dissatisfied. And with reason; for migration westward on a large scale began earlier in the South than the North, the frontiersman was better understood by southerners, and their attitude was more friendly to him. The Atlantic states were certain to lose some power, and the South was more likely to gain western sympathy than were New York and New England.⁷⁰ Monroe soon met with

⁶⁹ See especially Monroe to Jefferson, Jan. 19, 1786—*Writings*, 1: 112; Burnett, *Letters*, 8: 286.

⁷⁰ It is possible that in explaining the different attitudes of northerners and southerners one should assume a greater tendency of large-scale speculators in the South to become frontiersmen themselves. Mr. Abernethy remarks of one period of speculation in the Southwest: "There are significant implications in the fact that not one of the great land speculators of the Philadelphia and Eastern coterie of comparable standing to that of Shelby, Christian, Henderson, Russell, Preston, and their ilk settled in the West. They wanted the land merely for speculation"—T. P. Abernethy, *Western Lands and the American Revolution* (1937), 301-2. Of course large-scale northern speculators did go a little later to the Northwest.

Few faced as clearly as George Mason and Jefferson the fact that the Atlantic states were bound to lose political power. In the Federal Convention,

difficulties in his committee; according to him his opponents (those led by King) wished "to rescind everything" theretofore done, "particularly" to raise the population requirement for admission, substituting for the existing formula a requirement of a thirteenth part of the total population of the original states at the time of admitting a new state. Each side suspected the worst of the other. The demand for the new population test, "with some other restrictions" (presumably on self-government) which Monroe's opponents wished to impose on the territory, led him to conclude that their objective was to prevent altogether the admission of any new state.⁷¹ This opinion was expressed immediately after the submission of his committee's second report, which, as compared with the first, showed a great strengthening of the governor's power and of congressional control—in one instance seemingly by Monroe's initiative.⁷² Three days after writing the letter in which he expressed the opinion just quoted, and in which he expressed the further opinion that with one exception the remaining Massachusetts delegates—namely King, Sedgwick, and Nathan Dane—were "the most illiberal" he had ever known from that state,⁷³ Dane was added to his committee,⁷⁴ and undoubtedly (for a brief time) to his troubles.

But that was nothing as compared with those provoked in the committee by the bitter division in Congress over Jay's efforts to secure a trade treaty with Spain, particularly favorable to eastern commercial interests and especially those of the New England fishery interests, at the cost of foregoing for twenty-five or thirty years navigation of the Mississippi. When that controversy was at its climax Monroe became convinced that "Jay and his party," of which King and Dane were devoted members, would stop at nothing in seeking

speaking of the hesitations so evident in that body on this point, the former said: "If it were possible by just means to prevent emigrations to the Western Country, it might be good policy. But go the people will as they find it for their interest, and the best policy is to treat them with that equality which will make them friends not enemies"—M. Farrand, *The Records of the Federal Convention of 1787* (4 vol. 1937), 2: 454.

⁷¹ Letter of July 16, 1786 to Jefferson—*Writings* (Hamilton ed.), 1: 140-41; Burnett, *Letters*, 8: 404.

⁷² These matters are discussed *post* ccxc-ccxiii.

⁷³ He added of Dane and King: "The former is I believe honest but the principles of the latter I doubt"—citation as in n. 71.

⁷⁴ July 19, 1786—*Jour. Cont. Cong.* 30: 418 n. 1. He was replaced on Aug. 7 by Melancton Smith—*ibid.* 502 n. 1; and on Sept. 18 both he and Smith were included in the committee when Monroe and King were released.

to attain their objective, which he believed was either to disrupt the Confederation or to drive the western settlements into separation from the Union, thus ending the possibility of new states, and keeping the weight of population in the East "to appreciate the vacant lands of New York and Massachusetts."⁷⁵ In turn, King thought that all the delegates of Virginia were "probably deeply interested in the Ohio and Kentucky lands."⁷⁶

To the action of his committee on two points Monroe was strongly opposed. One was the requirement of too great a population, he thought, as a prerequisite for admission of a territory into the Union.

It was his opinion that the condition in Virginia's cession requiring the ceded territory to be organized into states could not lawfully be indirectly defeated by placing insuperable obstacles in the way of their organization; which, he felt, the new population formula forced on him in committee did. In his private letters he had expressed a determination, unless his opponents accepted Jefferson's formula, to propose another convention on the subject between Virginia and the Confederation.⁷⁷ However, the new formula was adopted. Nor was that all. Despite the compact made in 1784 between Virginia and her fellow members of the Confederation—despite its requirement that new states be organized and admitted, and be equal in all ways to the original states—despite the consequent constant repetition of those terms in the proceedings of Congress—the committee's report, after repeating these provisions in accordance with the compact, though subject to the new population formula, made admission subject to an additional condition, namely: "Provided the consent of so many States in Congress is first obtained as may at that time be competent to such admission."⁷⁸ It is perfectly clear that nothing in the original Articles of Confederation had reference to the admission of the new states here involved; that the

⁷⁵ See the postscript of Monroe's letter of Aug. 12, 1786 to Governor Henry, Burnett, *Letters*, 8: 424, and his letter to Madison, Aug. 16, in *ibid.* 427. His suspicions that some of his opponents might favor dismemberment of the Union were not unfounded; see Dr. Burnett's summary statement in his *The Continental Congress* (1941), 656-57.

⁷⁶ King to Gerry, June 4, 1786—Burnett, *Letters*, 8: 381.

⁷⁷ Letter of July 16, 1786 cited *ante* n. 71. He said, "and deny the right of the U. S. to act otherwise in it"; but how Virginia *could* secure a new compact with the other confederated states ("Confederation") does not appear.

⁷⁸ Sept. 19, 1786—*Jour. Cont. Cong.* 31: 672.

compact of 1784 between independent sovereign states relating to them, either outside those Articles or in amendment of them, was controlling; and that this last proviso in the report was legally without basis. If authority be needed on that point there is that of Chief Justice Taney. However, all this criticism is no more applicable to the action of Monroe's opponents in his committee than to the action of the Federal Convention in accepting Gouverneur Morris' draft of the Constitution's clause on the admission of states in discretionary form without *excepting* from its operation the territory Virginia had ceded—since, as respects states from that region, no legal discretion could actually have existed.⁷⁹

To none of the other differences between the second and third reports of the committee could Monroe have been seriously opposed, if at all. But the two provisions just referred to are sufficient to justify an assumption that he must have desired—and King been willing—to be disassociated from the third report, the committee being reconstituted, and both of them relieved of service, on the day before that was submitted to Congress.⁸⁰ Nevertheless it seems highly probable that at least its substance must have been agreed upon and drafted by the old committee.

This was not, however, the end of the matter. It will be remem-

⁷⁹ See cxxviii *ante*, clxxxv *post*.

Professor F. L. Paxson has written that "Jefferson proposed loose and inadequate terms of admission"—*American Frontier*, 62. Since Congress had no explicitly stated power under the compact between Virginia and the Confederation to set *any* conditions, perhaps Jefferson can be fairly criticized only for proposing any. If it be assumed that Congress might impose reasonable conditions (if not inconsistent with the compact, as that of Monroe's committee stated in the text was), then Jefferson would be justly open to criticism for any unreasonable requirements. But his population requirement, tested by later events, could scarcely be judged unreasonable—*post* n. 86. What Mr. Paxson meant by "loose and inadequate" is not clear.

⁸⁰ On July 13, (1786) Congress voted recommitment to Monroe's committee of his report of that day "*and* Petition of Inhabitants of Kaskasies"—*Jour. Cont. Cong.* 31: 561 n. 1. A report on the second subject was submitted on Aug. 23 and agreed to on Aug. 24, Monroe being there named as chairman—*ibid.* 561 n. 1, 563. It was in six lines, in Monroe's writing: that the petitioners be informed that a plan for government of the entire territory was under consideration, and that its adoption would be "no longer protracted than the importance of the subject and a due regard to their interest may require"—*ibid.* 563. The main subject remained to be disposed of, and on Sept. 18 a new committee consisting of William Samuel Johnson, Charles Pinckney, Melancton Smith, Nathan Dane (see *ante* n. 74), and William Henry was appointed to report on that—*ibid.* 667 n. 1. They reported the next day—*ibid.* 669-73; evidently, then, the report must have been prepared, at least substantially, in the old committee.

bered that Congress had recommended to Virginia that she alter her compact with the confederated states as respected the permissible number, and therefore possible variation in size, of new states to be admitted.⁸¹ If Virginia should adhere to the stipulation of ten small states, probably none could ever be admitted under the King population formula. Only a fortnight after the third report had been made, but also after Jay had lost his battle over the Mississippi, Dane moved that "when the said State shall finally determine, relative to the said recommendation, Congress will ascertain and fix the number of free inhabitants which shall entitle each . . . new state . . . to an admission into the Confederacy."⁸² Dane was not a man to act without a purpose, and no possible purpose for this motion is discernible unless it was a tender of peace to Monroe—presumably in the hope of avoiding the anomalous action which in fact occurred, of the Ordinance's being passed with a provision giving Congress discretion to create from three to five states long before Virginia authorized that change in the compact.⁸³ Nothing on the subject is of record, but again it is impossible to suppose that a matter that had been so controversial—and was to be equally so within a few months in the Federal Convention—was not the subject of much thought. There was no further debate of the subject in Congress until the first proposals of the Ohio Company reopened serious consideration of the governmental plan. King's provision was then struck out, and Dane himself included in his first full draft of the Ordinance of 1787 the provision that a population of sixty thousand should entitle a state to admission.⁸⁴ In this connection it is not to be forgotten that no other than Alexander Hamilton had approved admission when population reached twenty thousand.⁸⁵

King's formula was necessarily somewhat less liberal than Jefferson's to the inhabitants of the prospective new states. Looking back-

⁸¹ *Ante* at notecall 63.

⁸² Oct. 4, 1786—*Jour. Cont. Cong.* 31: 738.

⁸³ See *ante* n. 61. It is possible that Monroe's attitude, if allowed to reach the opposition, may have facilitated a compromise on 60,000 as the population required for admission. The opposition evidently relied on something in the Ordinance to secure Virginia's consent to the desired change in the compact, and it seems likely that it was this population amendment.

⁸⁴ It survived a debate on May 10, was stricken in the debate of July 9, and the new formula appeared in Dane's draft of July 11—*Jour. Cont. Cong.* 32: 281 n., 283, 320.

⁸⁵ *Ante* n. 42.

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ward, we know that the rule actually adopted in the Ordinance of 1787 was (as applied—and probably fairly) the most liberal; that the results under Jefferson's would have been not very dissimilar; but that King's rule would very greatly have postponed the admission of each of the states of the Northwest Territory, leaving Wisconsin still a territory until after the opening of the present century.⁸⁶ The consequences of its adoption upon the later course of our national history are extraordinary to contemplate. Thus the King-Dane group in the committee, the conservatives, first won a very great victory over Monroe, and then lost all they had won and even more by the act of Dane, who was a stalwart of their party. There is no evidence on the subject, but the matter was so bitterly contested as to justify suspicion that some understanding preceded Dane's proposal of the new formula. It is unlikely that either side made a voluntary sacrifice. The importance of the population requirement was lessened when it became certain that the first population of the territory (so far as frontier settlement could be at all controlled), and likewise the initial form of government established over it, would be what the conservatives desired. Whatever may have been the compromise, if any, it seems likely that what gave Monroe's adherents substantial victory in 1787 was their sounder (or possibly merely luckier) estimate of the relative future growth of the western and eastern states.

In considering the causes which impeded progress in developing plans for territorial government there is another provision of Jefferson's original report, but not of his ordinance as adopted, to which attention should be called. This was the clause prohibiting slavery in all federal territory, north and south, and which was not approved by Congress.⁸⁷ It might be imagined that the exclusion of the anti-

⁸⁶ Ohio, actually admitted in 1803 (see *ante* n. 303 of Sec. II), would have qualified under Jefferson's formula well before 1810 but under King's—as pointed out by George Bancroft, *History of the United States of America* (last revision, 1887), 6: 281—not until 1822. The corresponding figures for the other states would be: Indiana—1816, before 1820, after 1850; Illinois—1818, before 1830, after 1860; Michigan—1837, well before 1840, after 1880; Wisconsin—1848, well before 1850, after 1900. Except in the case of Wisconsin, I have not checked Mr. Bancroft's figures. Mr. Dunn did Monroe an injustice in referring to the population formula forced upon him by his opponents as "Monroe's plan"—*Indiana*, 205.

⁸⁷ *Jour. Cont. Cong.* 26: 119, 247, 277; Jefferson to Madison, April 25, 1784—Burnett, *Letters*, 7: 500; Jefferson, *Writings* (Ford ed.), 3: 471.

slavery provision might rather have accelerated than impeded further progress of plans for territorial organization. That, however, would be dependent upon balancing the adjustment of various regional interests, and it is extremely interesting that to Mr. Burnett "the exclusion of the provision for the abolition of slavery appears to have been one of the reasons why the plan of government lay dormant for more than three years."⁸⁸

We have now, after correcting misconceptions respecting the general nature of Jefferson's governmental plan, considered the reasons why it could not for some years be given actual application in territorial government. It was necessary to abandon hopes of controlling in any idealistic manner westward migration, to compromise between indiscriminate location and township sales of land, to make adequate treaties with the Indians. Of these matters very little has been said. It was further necessary to agree upon the number, and so upon the approximate size, of new states, and to fix the population they should be required to attain precedent to their admission to the Union. Of these matters, since they became part of the Ordinance of 1787, much more has been said, their history being traced from Jefferson's plan through the several stages of its revision down to their ultimate form in the Ordinance. These problems being out of the way, nothing over which there could reasonably have been dispute and delay remains for consideration except the agreement on the general character of the territorial government that was to be established and the details of its administrative provisions. It might be supposed that these last two problems must have aroused sharp divisions of opinion in the committee, since two years and more passed between the appointment of Monroe's committee in March 1786 to prepare a new governmental plan and the submission for first reading of the Ordinance of 1787.

At the beginning of this section something was said of the extra-

⁸⁸ *Letters*, 8: xxxix. If this opinion is based upon his unrivaled knowledge of what was, in those years, in the minds of members of Congress and their correspondents, I should not venture to doubt its soundness. If, however, it is intended to convey the idea, or is based on an assumption, that New Englanders waited until 1787 to purchase lands because they were waiting for a prohibition of slavery, the opinion seems very questionable. Reasons will be given later for believing that antislavery did not actually play in the plans of the Ohio Company and the drafting of the Ordinance of 1787 the part which many have assigned to it.

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ordinarily democratic character of Jefferson's plan. It may be emphasized here. Before Vermont had done so, and eight years before the constitution of Kentucky became the first of any Union-state to follow Vermont in doing so, the ordinance provided for manhood suffrage in all federal territory, and so, prospectively, in the states that would be formed therefrom.⁸⁹ As respects local government by Congress, it was limited in nature to the "preservation of peace and good order"; in time, to such action as might "from time to time" be necessary, *and only until the settlers claimed the privilege of self-government*. The establishment of temporary self-government, under the constitution and laws of any original state which the settlers preferred, was subject to no requirement whatever of definite population; "the settlers" could initiate it at any time. If, however, the prospective burdens of such a temporary government delayed its creation, they could continue living, *with the assurance of scanty interference meanwhile by Congress*, until they numbered twenty thousand, when they could form their own constitution and permanent government.⁹⁰

How different was the situation under the governmental plan of the Ordinance of 1787 has been already noted in a general way. As Professor McLaughlin made plain many years ago, the distribution of powers between colonies and mother country that grew up in the administration of the old Empire became the basis of American federalism.⁹¹ The first attempt to put it on paper was in the Articles of

⁸⁹ The electors were to be "free males of full age"—*Jour. Cont. Cong.* 26: 276. Of eighteenth century constitutions, both of Vermont's, of 1786 and 1793, conferred manhood suffrage; Kentucky's of 1792, and, only alternatively, Tennessee's of 1796 (which required a freehold of nonresidents).

⁹⁰ For a second reason (see *ante* n. 21 for a first) why Jefferson's ordinance was not put into actual effect, Dr. Farrand suggested that it could not "operate until settlers became numerous"—*The Fathers of the Constitution*, 71. This was true of the admissions clause of both ordinances; but under that the Ordinance of 1787 proved actually to be more liberal—*ante* n. 86. As respects every other part of the two enactments a comparison greatly favors Jefferson's, and Dr. Farrand's statement is therefore inaccurate.

⁹¹ A. C. McLaughlin, "The Background of American Federalism" (1918), *American Political Science Review*, 12: 214.

"Let us reduce this to its lowest possible terms: (1) federalism as a political system rests primarily on the distribution of powers among governments; (2) in the old British empire, there were many governments, and in practice, if not in law, each occupied its particular field; (3) the powers assigned to the national government under our Constitution, were, in an amazing degree, the powers commonly exercised by the central government of the old empire"—A. C. McLaughlin, "Some Reflections on the American Revolution," in T. Sizer, *et al.*, *Aspects of the Social History of America* (1931), 33.

Confederation, and in this respect the Ordinance was an addendum to the Articles⁹² in that it created a colonial system—hardly distinguishable from that from which the Revolution had just freed the confederated states.

It remains to trace the legislative proceedings by which this was accomplished, and to consider the causes of that action.

II

The general causes are partially revealed at the very beginning of those proceedings. Various officers and soldiers of the Revolutionary army petitioned Congress in the spring of 1783 to make them a grant of land for a new state beyond the Ohio—and, in fact, to bear most of the expenses in its settlement. The most remarkable features of the plan, as illustrating Anglo-American instincts of self-government, were that, in advance of any settlement, “the associators” were to frame a constitution (“the total exclusion of slavery . . . to form an essential and irrevocable part” thereof); agree on rules for the prevention and punishment of crime and the maintenance of peace and good order, which should for two years (unless sooner altered) have the force of law; and elect delegates in Congress who should take their seats “as soon as the new State [should] be erected.”⁹³ *That is, there should be no period of territorial status preceding admission to the Union.*⁹⁴ And why need there have been such, considering, as Washington said, that the promoters were of such qualities that the land could not be “so advantageously settled by any other Class of Men”? Shortly after their petition had been received by Congress it voted to accept, subject to conditions, Virginia’s offer to cede her claims to the

⁹² A lawful addition, by amendment of the Articles, it has been contended in the second section of this introduction—*ante* lxxxiv-xci; and a legislative, in no part “constitutional,” addition, as shown in the third section.

⁹³ The proposal was that Congress should furnish clothing, arms, and utensils. They are printed in O. Pickering, *Life of Timothy Pickering*, 1: 546-49, see 457-60; the proposals, petition to Congress, General Putnam’s explanatory letter of June 16, 1787 to Washington, and the latter’s letter of June 17 to Congress, are in W. P. Cutler, *Manasseh Cutler*, 1: 156, 159, 167, 162 respectively. Washington’s letter is in his *Writings* (Fitzpatrick ed.), 27: 16.

⁹⁴ Whether this was the final plan, or the plan of a first draft (presumably Pickering’s), is not certain; for a draft by General Putnam lacked this feature—R. Buell, *The Memoirs of Rufus Putnam and Certain Official Papers and Correspondence* (1903), 215.

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Northwest.⁹⁵ At this same time various problems relating to Indian affairs were under consideration by a committee of which James Duane was chairman, and by order of Congress Duane had consulted General Washington.⁹⁶ It is evident that any long-time solution must have suggested the necessity of establishing some local government over the western settlers, and in fact the preparation by Jefferson of his ordinance of 1784 for the government of the federal territories resulted from the action by Congress on one resolution reported by Duane's committee in October 1783.⁹⁷ After dealing with the subject primarily referred to it, the committee submitted these additional reflections:

that they do not offer the measures which they have suggested as a sufficient security *against the increase of feeble, disorderly and dispersed settlements* in those remote and wide extended territories; *against the depravity of manners which they have a tendency to produce*; the endless perplexities in which they must involve the administration of the affairs of the United States; or against the calamities of frequent and destructive wars with the Indians, which reciprocal animosities unrestrained by the interposition of legal authority must naturally excite; and that in their opinion nothing can avert those complicated and impending mischiefs, or secure to the United States the just and important advantage which they ought to derive from those territories, but the speedy establishment of government and the regular administration of justice in such a district thereof as shall be judged most convenient for immediate settlement and cultivation: whereupon,

Resolved, That it will be wise and necessary, as soon as circumstances will permit, to erect a district of the western territory into a distinct government, as well for doing justice to the army of the United States, . . . as for the accommodation of such as may incline to become *purchasers and inhabitants*; and in the interim, that a committee be appointed to report a plan, *consistent with the principles of the Confederation*, for connecting with the Union by a temporary

⁹⁵ The quotation is from Washington's letter to Congress, June 17, 1783—*Writings* (Fitzpatrick ed.), 27: 16. The vote by Congress was of Sept. 13, 1783—*Jour. Cont. Cong.* 25: 554-64.

⁹⁶ *Ibid.* 24: 264 n. 1, 421 n. 2.

⁹⁷ The committee submitted two resolutions; one, that a committee be appointed to report an ordinance for regulating the Indian trade; the other, that a committee be appointed to report a plan for the temporary government of a district of the western country. One would expect Jefferson's governmental plan to have resulted from the second commitment; in fact it resulted from the first. He was made chairman of the first committee, Duane of the second, but the duties of both eventually devolved upon Jefferson. *Ibid.* 25: 693 n. 1; 26: 118.

government, the purchasers and inhabitants of the said district, *until their number and circumstances shall entitle them* to form a permanent constitution for themselves, and, as citizens of a free, sovereign and independent State, *to be admitted* to a representation in the Union; provided always, that such constitution shall not be incompatible with the republican principles, which are the basis of the constitutions of the respective states in the Union.⁹⁸

The second of the passages italicized in this quotation indicates an objective of maintaining peace in the border settlements; the third, that of protecting the titles of eastern speculators; and notwithstanding that the fourth reflects a doubt whether Congress had power to *act at all* on the subject, the fifth reflects an inclination—all the more significant if not an opinion consciously considered—not only to maintain the “temporary” government until admission to the Union but to make admission dependent upon “circumstances” *unstated in the conditions set by Virginia on her cession and approved by Congress just one month before this report by Duane*.⁹⁹ And, as to the question of the duration of territorial government, let it be noted that although in state papers of Congress and the several states there had been various references before this time to the organization of “states” in the West—and various references after this time were made to their organization—virtually none of all these discloses any intent whatsoever as to whether any probationary period of tutelary status should precede admission to the Confederation, let alone the duration of such.¹⁰⁰ The significant facts are: that conservatives were able to establish a requirement of probation and of prolonged probation.

As stated above, it was as a result of Duane’s report that Jefferson drafted his governmental plan, which provided for the organization, almost immediately, of “states” in the fullest sense over the western settlers, and but for a last-minute amendment would have provided for no government by Congress antecedent to admission into the Union.¹⁰¹ The fact that Congress adopted his plan, with that amendment, clearly indicates that liberal opinions had dominated

⁹⁸ Oct. 15, 1783—*Jour. Cont. Cong.* 25: 693-94; italics added.

⁹⁹ The first embodies the assumption, still prevalent at that time (*ante cclxiii seq.*) that settlement could be directed into particular districts successively. Compare *ibid.* 24: 406, 444 n., and 25: 560, 564.

¹⁰⁰ Compare *ante* n. 14 of Sec. II, also lxxii.

¹⁰¹ On the ideas of a “state”—and even of a “free sovereign and independent State”—existing before admission to the Union, compare *ante* clxviii *seq.*

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Congress at Annapolis in the autumn of 1783 and still dominated it when the plan was adopted in the spring of 1784. For it was in long debates at Annapolis, and perhaps earlier at Princeton, that all the substance of Jefferson's ordinance had been agreed upon.¹⁰² But much happened thereafter, particularly the Shays Rebellion, to strengthen conservatives; enough to enable them to make both the Ordinance of 1787 and the new Constitution thoroughly conservative documents. Because the latter was a compact between equal and theretofore sovereign states, it was necessarily based on the doctrine of equality—of states and (since the people of each, as politically organized, were each state) of the citizens of states; consequently, the Constitution's framers were *forced* to minimize colonial thinking. But in the Ordinance of 1787 they showed that such thinking was an essential part of their mentality—the same men in part, all the others of the same social and economic class. In dealing with federal frontier government they could not rise above the illiberalities of state legislation on the border problem of their time. And the greatest of all illiberalities, which made possible all the others, were embedded in the Constitution. The first, in giving to Congress an unqualified power to govern territories while they remained such. The second, in imposing upon Congress no duty to admit new states (though the cession compact between the Confederation and Virginia, elsewhere confirmed in the Constitution, *did* impose it as respected those formed in the Old Northwest,¹⁰³) but stating only a discretionary power, by which Gouverneur Morris, its draftsman, hoped to exclude all others (which would necessarily come from "foreign" territory) forever from the federal system.¹⁰⁴

¹⁰² Of the work of the committee (Jefferson's) David Howell wrote on Feb. 21, 1784 from Annapolis: "The mode of government during the Infancy of these States has taken up much time, and was largely debated at Princeton last Summer"—letter to Jonathan Arnold, Burnett, *Letters*, 7: 452. Although elected a delegate to Congress on June 6, Jefferson did not leave Monticello until Oct. 15, and only reached Congress on Nov. 4, shortly before its adjournment to Annapolis. He served steadily until he left Congress on May 11 preparatory to sailing for France. His committee (with Chase and Howell ultimate fellow members) had been appointed on Dec. 18—*Jour. Cont. Cong.* 25: 693 n. Much of Howell's long letter of Feb. 21, 1784 is left unprinted by Mr. Burnett; see W. R. Staples, *Rhode Island in the Continental Congress*, 478-82 for the full text, or A. B. Hu'bert, *Ohio in the Time of the Confederation*, 69-73 for a reprint (not perfect) of all of the matter therein relating to the committee's work.

¹⁰³ *Ante* at notecalls 177-78 of Sec. II.

¹⁰⁴ *Ante* at notecall 79.

In the spring of 1786 the moves began for a conservative revision of Jefferson's governmental plan. The process has been above reviewed with reference to certain of its provisions, and will now be considered in a more general manner. It will be evident that Monroe long resisted some of the most extreme views in favor of prolonged tutulary government.

His first ideas that Jefferson's plan needed any conservative revision may possibly have come to him as a result of serving on a committee which studied in the spring of 1785 the specific problem of government in the Illinois Country.¹⁰⁵ In the summer of that year he wrote to Jefferson that when government of the western territory should again be considered it would "be determined what authority Congress will exercise *over the people who may settle within the bounds of either of the new States* previous to the establishment of a temporary govt. whether they will leave them to themselves or appoint magistrates over them."¹⁰⁶ The conjunction in Monroe's mind of the two problems, which were very different, was unfortunate.

The French had always been ruled by magistrates and commandants; their petitions were for such—though they *learned* to pray for elected magistrates; they did not know and did not desire our mode of government.¹⁰⁷ Temporarily, an immediate government for them of a special type was needed. Still more unfortunate was the merger, in the committee work of Congress, of the Illinois problem in the general problem of western government. As a matter of fact it began in Monroe's hands, when he became chairman of the committee which began the revision of Jefferson's plan that eventuated in the Ordinance of 1787.

Monroe began his movement to revise that plan by a motion for consideration by the grand committee of its provision for ten small states. We have already seen that its report properly attacked that very foolish provision,¹⁰⁸ and that this report was immediately re-

¹⁰⁵ *Post* ccxcvii seq.

¹⁰⁶ Letter of June 16, 1785 to Jefferson—*Writings* (Hamilton ed.), 1: 87; Burnett, *Letters*, 8: 144. The committees of which he was a member submitted reports—*Jour. Cont. Cong.* 30: 115, 330-32, 907-9.

¹⁰⁷ Philbrick, *The Laws of Indiana Territory, 1801-1809* (*Illinois Historical Collections*, 21), ccxvi-ccxxii.

¹⁰⁸ *Ante* cclxxi-ii.

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ferred to a special committee with Monroe as chairman. The instructions to the latter were to report a plan of government "prior to the institution of temporary government there" under Jefferson's ordinance.¹⁰⁹ In its report, however, the committee completely ignored this restriction, submitted a plan for territorial government down to the time of admission as a member state of the Confederation, and recommended the repeal of Jefferson's ordinance *in toto*.¹¹⁰ Whether or not this was a violation of the committee's instructions is possibly a question, in view of the *Journal's* slightly ambiguous form. Seemingly, and presumably, it was.¹¹¹ If so, the action adds to the committee's words additional evidence of its antagonistic spirit.

In the earlier report of the grand committee it had been stated to be, in its opinion, "highly expedient that settlements in that Country should be formed into governments as soon as possible, and admitted into the Confederacy; *that order and the true principles of government may be established among them*, and they become an accession of strength to the Union."¹¹² In Monroe's report there is likewise matter that throws light upon the attitude of the committee toward their fellow citizens on the frontier. The nurturing of new western states, to become members of the Confederation, could be accomplished, they said,

only by promoting its [the territory's] settlement and securing to its settlers and others who may purchase the soil, the rights of property and of personal safety, *with the Conditions upon which they shall ultimately obtain that important privilege*. The Committee therefore think it the duty of Congress to adopt and publish, previous to the sale of any part of the said territory, the plan of a temporary

¹⁰⁹ March 27, 1786—*Jour. Cont. Cong.* 30: 139 n. 1.

¹¹⁰ May 10, 1786—*ibid.* 251-55.

¹¹¹ It appears that on March 27, 1786 the committee (Monroe, Johnson, King, Kean, and Pinckney) were appointed "on 'Report of the Comee. respecting the Settlers at Kaskaskies[']'. To consider and report forms of government" etc. *subject to the restriction stated in the text—Jour. Cont. Cong.* 30: 139 n. 1. But on p. 251, the *Journal*, introducing the report of the committee (with no reference whatever to the Illinois Country) refers to the committee as those "to whom a motion of Mr. [Nathan] Dane was referred for considering and reporting the form of a temporary government for the western States," *without the restriction*. See also *ibid.* 31: 561 n. 1. *Prima facie*, the restriction, and a violation, were present.

Dane was, with Monroe, a member of the grand committee to which Monroe's opening motion was made. Thus far—not later—they were probably working wholeheartedly together.

¹¹² March 24, 1786—*Jour. Cont. Cong.* 30: 132; italics added.

government for said State or States, with the period at which it shall expire, and they assume their form and equal Station in the Confederacy.¹¹³

This was an unqualified statement that the plan they submitted was for a government that should continue until admission; in other words, to take the place of three stages of government under Jefferson's plan—that preceding formal self-government, during which Congress might, if judged necessary, take measures to maintain peace and order; that of "temporary" self-government under the laws of an original state, and pending attainment of a population of twenty thousand; and that of "permanent" self-government under their own constitution from then until the population should equal that of the then least populous original state, when the new state should be admitted to the Union. The committee, at the end of their report, further explained their attitude. Said they:

The object for which this *temporary* government is instituted being to protect the persons and rights of those who may settle within such districts *in the infancy of their settlement*, the United States look forward with equal anxiety to the period at which it shall cease and they be admitted, agreeably to the Condition of the Acts of Cession into the Confederacy.

This shall be the case *so soon as they shall respectively obtain a common interest in its affairs*, with such mature age and strength as to be able to *act for themselves*, the highest and most satisfactory evidence of which is, the number of inhabitants they . . . contain. . . .¹¹⁴

These two committee reports make it plain that the revisers had a low opinion of the civic virtues of the western settlers, and proposed to take whatever time might be necessary to educate them not only to the practice of law and order as the revisers understood those words,—which alone was surely a great undertaking—but also to the point of subordinating their purely individual interests, which made them *frontiersmen*, to "a common interest" in the Confederation that would make them *nationalists*. (A failure to see that by the fact of leaving their several states and living far-removed together they *were* essentially nationalists was one blind spot of the Ordinance's framers.) Monroe's report also hinted the possibility of "conditions" that might be imposed upon the "privilege"—which

¹¹³ May 10, 1786—*ibid.* 251; italics added.

¹¹⁴ *Ibid.* 255; italics added.

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in truth was a legal right created by formal action of sovereign states—of admission to the Union. The quoted passages of the two reports are a perfect example of the patronizingly ministrant attitude toward the frontiersmen of those who did not wander.

In order to understand references to the changes made at different dates in the governmental plan, it will be useful to enumerate the successive reports involved. Two reports (of May and July 1786) were made by the revising committee while Monroe remained its chairman; a third report, manifestly prepared during that period but which he was unwilling to sponsor, was presented (in September 1786) immediately after he was dropped in a reconstitution of the committee. After this there exists a print of May 9, 1787 which, with manuscript notations, shows the results of debates, earlier and later, of the preceding "third report" down to July 9; this paper will for present purposes be called the fourth draft. And finally there are printings showing the forms in its three readings on successive days of Nathan Dane's draft of the Ordinance of 1787.¹¹⁵

Certainly the insertion of one provision,¹¹⁶ possibly the insertion of a second,¹¹⁷ very probably the deletion of a third,¹¹⁸ entered into the causes of Monroe's retirement. But only the last directly affected the character of the territorial government *while it endured*; and consequently one must say that, with the probable exception of that provision, he had formally sponsored and presumably approved every feature of the governmental plan in the Ordinance of 1787; the strictly governmental or administrative plan of the earlier reports being carried over, unaltered in substance, into that Ordinance.

¹¹⁵ These records will be found as follows: Monroe's first report—May 10, 1786, *Jour. Cont. Cong.* 30: 251-55; his second report—July 13, 1786, *ibid.* 402-6; the third (or Johnson report)—Sept. 19, 1786, *ibid.* 31: 669-72; the "fourth draft"—*ibid.* 32: 281-83, see 275 n. 2 and 281 n. 1; Dane's two printed drafts of July 11 and 13, 1787—*ibid.* 314-20, 334-43.

¹¹⁶ The substitution of King's for Jefferson's population formula for admission to the Confederation—*ante* cclxxv-vi *seq.*

¹¹⁷ The condition stated and commented upon *ante* at notecall 78; but one is left in doubt regarding that because of his own reference to possible conditions stated in the text preceding notecall 113.

¹¹⁸ The population requirement for organization of a general assembly was left blank in Monroe's first report (May 10, 1786—*Jour. Cont. Cong.* 30: 253), was made 500 in the second (July 13, *ibid.* 31: 671) and became 5,000 in the report as ordered printed on May 9, 1787 (*ibid.* 32: 282), and so remained in the Ordinance of 1787 (July 11, 1787—*ibid.* 316, unchanged when passed July 13).

And it was this plan which, because of its illiberalism, made the Ordinance the very antithesis of Jefferson's.

There were certainly, in Monroe's second report as compared with the first, not merely clarifications of phraseology¹¹⁹ but improvements of substance;¹²⁰ notably the elimination of the governor's power to dissolve the general assembly, which, however, was restored in the fourth draft and carried therefrom into the Ordinance of 1787. Powers to convene and prorogue were given to him from the beginning, and also of veto (though that was omitted, presumably by inadvertence, in the third report). Liberalism was evidenced in the second report by conceding the right to representative government when the territory should contain five hundred free white male adults.

Nevertheless, nearly every change made in the first report was for the purpose of making congressional control of the territory more direct and close, or of increasing the governor's powers. A legislative council was established as one house of the general assembly, appointed by the united states in Congress (after 1789 by the president with consent of the Senate), with tenure "during pleasure." The secretary was required to transmit quarterly to Congress (after 1789, to the president) his record of all official acts and proceedings, executive and legislative. Pending organization of a general assembly, the governor was empowered to lay out counties and lesser territorial divisions and to appoint all officials of such divisions deemed necessary for the preservation of peace and good order. He was further empowered to act directly on evidence offered to him of the population required for transition to representative government, without referring the same to Congress. In place of manhood suffrage, prescribed in Jefferson's plan, Monroe's first report required citizenship in one of the united states and a freehold estate in fifty acres of land (or the latter with a year of residence for aliens); and the second required for representatives, citizenship or three years of residence

¹¹⁹ One extraordinary example is that relating to restrictions upon the powers of the general assembly over lands within the territory—first report, *ibid.* 254; omitted in second, 405; and third, 672, by Rufus King's motion, 406 n. 1.

¹²⁰ The first report recommended an executive council which the governor was bound to consult, though their anticipated relations were such that the secretary must enter in the governor's presence the council's advice, and in the council's presence the governor's reasons for disagreements with advice given—*ibid.* 252. This council appeared in no later report or motion.

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and fee simple ownership of two hundred acres of land. No plan preceding Dane's fixed any property qualifications for the governor, councilors, or judges, for the first of whom he prescribed a freehold of one thousand, and for the others of five hundred acres. The very liberal population requirement for transition to representative government, fixed in Monroe's second report at five hundred "free [white] male" adults, was struck out in the third report and fixed in the fourth at *ten times* this figure. And although his first report gave the right, after establishment of representative government, to keep in Congress a delegate entitled to debate, though not to vote (this provision being taken from Jefferson's ordinance), it was omitted in all later drafts until Dane restored it.¹²¹

It will be noted that only one distinctly liberal change was made—to deprive the governor of the power of dissolving the assembly—and that was not allowed to stand. Only one distinctly illiberal change was reversed—that which denied the territory a delegate in Congress. The proceedings constitute a striking record of consistent reaction when contrasted with the state constitutions of the Revolutionary era. There is nothing, moreover, that indicates any division of opinion in the committee's work, with reference to the character of government, between such men as Monroe and Charles Pinckney on one hand and Rufus King and William Samuel Johnson on the other. The fact is, of course, that either dislike of frontiersmen or fear of the future political power of the West, or both those attitudes, were common to conservatives of all sections of the East. The difference between men like Jay and King on one hand and men like Washington, George Mason, and Jefferson on the other was not in appreciation of these political problems, but in what the latter regarded as the solution. They believed that fair treatment of the West as an equal would save it and the Union; that was a constant theme in Jefferson's letters. What he feared was that both might be lost by a selfish disregard of western sentiment and rights, as by consent to a closing of the Mississippi.¹²² Washington's position was much the same. Many letters from him on the dangers can be quoted, but many

¹²¹ In this Dr. Cutler played a part, *post* n. 330.

¹²² Letters to Monroe of July 9 and Aug. 11, 1786—*Writings* (Ford ed.), 4: 246-48, 262-63; to Madison, Dec. 16, 1786, Jan. 30 and June 20, 1787—*ibid.* 333-34, 363-64, 391-92. Compare statements of Roger Sherman, Madison, and Mason in the Federal Convention, Farrand, *Federal Convention*, 1: 534, 578-79; 2: 454.

others express a belief that the creation of better trade routes to the West would hold it, and to this he therefore long devoted all his free time.¹²³

The whole matter had been long debated in Congress, probably endlessly outside, for several years, and no doubt general attitudes were well settled before the work of Monroe's committee began. For at least a year before that Monroe himself had evidently regarded as open to question the period during which self-government should be postponed. As he truly prized nonpartisanship and frankness, he had expressed his views freely to Jefferson,¹²⁴ and it was in the same spirit that within a month after he began his work of revision he invited Jay to meet with his committee for consultation, stating with astonishing but admirable candor that the first question before them with respect to government was, "Shall it be upon Colonial principles . . . or shall they be left to themselves . . . ?"¹²⁵ Within three weeks after that his first report showed the conclusion reached by the committee, and he wrote to Jefferson:

the plan of a temporary gov't to be instituted by Congress and preserv'd over such district *until they shall be admitted to Congress* is . . . reported. the outlines are as follows. Congress are to appoint as soon as any of the lands be sold a govr., Council, Judges, secretary to the Council, and some other officers; the govr. and Council to have certain powers [a remarkable understatement] untill they have a certain number of inhabitants, at wh. they are to elect representatives to form a gen. assembly to consist of the govr. and council and sd house of representatives. It is in effect to be a colonial gov't similar to that wh. prevailed in these States previous to the revolution, with this remarkable and important difference that when such districts shall contain the number of the least numerous of the "thirteen original States for the time being" they shall be admitted into the confederacy. The most important principles of the act at Annapolis are . . . preserv'd in this report. It is generally approv'd of.¹²⁶

¹²³ "The great object . . . is to connect the Western Territory with the Atlantic States; all others, with me, are secondary"—letter to Edmund Randolph, Aug. 13, 1785, *Writings* (Fitzpatrick ed.), 28: 218; see also 27: 475, 483, 488-89; 28: 4, 64-65, 72, 79, 204-5, 207, 231, 291, 460.

¹²⁴ *Ante* at notecall 106.

¹²⁵ The invitation, of April 20, 1786, is in Burnett, *Letters*, 8: 342.

¹²⁶ May 11, 1786—Burnett, *Letters*, 8: 359-60. He was not here referring to action by the Annapolis convention, which had not yet met, and therefore must refer, as Mr. Burnett assumes (*The Continental Congress*, 652), to action taken at Annapolis (*ante* n. 102) on Jefferson's ordinance. But the statement is most extraordinary. What *had* Monroe, in his first report of

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Later, after submitting his second report to Congress, he wrote again:

It has been propos'd & supported by our State to have a Colonial govt establish'd over the western districts & to cease at the time they shall be admitted into the Confederacy; we are fully persuaded will be beneficial to the settlers & to the U. S. & especially those to whose frontiers such establishments form'd [would form] an immediate barrier.¹²⁷

The accuracy of Monroe's description of the government he recommended, as "colonial," is manifest. Some other members of the Congress so described it;¹²⁸ probably all did, and none could have challenged the term. Nevertheless, as Professor Evarts Greene put it, Americans have preferred to use the term "territorial."¹²⁹

May 10, preserved of Jefferson's ordinance? Not a jot of its plan of actual government; two only of the seven fundamental conditions which (at least) Jefferson wished to have made interstate agreements—*ante* n. 53, *post* n. 370. Little, therefore, beyond the provisions that states should be formed from the Territory and ultimately admitted into the Union. These are the only principles explicitly mentioned in his letter, and nothing else appears to justify his employment of the plural of the word. This would make Monroe dishonest *if* self-government were one of "the most important principles" agreed upon by Jefferson's committee at Annapolis. But many persons—possibly including Jefferson, *post* cccv *seq.*—did not so regard it. Hence, Monroe's letter must be taken as showing, (a) that he was of that group; (b) that he was reduced to asking Jefferson to take comfort from his retention of principles as to which neither he nor Jefferson had any freedom of action whatever.

¹²⁷ Letter of July 16, 1786—Burnett, *Letters*, 8: 404; *Writings* (Hamilton ed.), 1: 140-42. In reference to troubles in his committee—*ante* cclxxxix—he added: "this hath not been decided on & hath only been postpon'd in consequence of the inordinate schemes of some men above alluded to as to the whole policy of the affairs of that country."

¹²⁸ On Sept. 28, 1786 the Rhode Island delegates reported to the governor of that state: "an ordinance for the establishing a colonial Government in the western territory is nearly completed"—Burnett, *Letters*, 8: 471.

¹²⁹ He referred to the later ordinance's "provisions for colonial or, as Americans prefer to call it, territorial government," adding that the government established (and this after the end of the first administrative stage—of nonrepresentative government) was one closely resembling that of an English royal province, more particularly that of Massachusetts under the charter of 1691, with Congress taking the place of King. . . . So far, then, as strictly colonial government is concerned, the ordinance was not strikingly original"—E. B. Greene, *Foundations of American Nationality* (1922 ed.), 577. Bancroft used the phrase "colonial dependency"—*History* (last revision), 6: 281. It is interesting that Rufus Putnam in 1783 used the phraseology, "distinct government (or Colloney of the United States)"—R. Buell, *Memoirs of Rufus Putnam*, 215. Recent historians have increasingly used the word. Professor Paxson has used it—*ante* n. 2. He also cites B. A. Hinsdale's book as *The Old Northwest. The Beginnings of our Colonial System* (1888), but I have not found that title in any of the publishers'

What was it that the revisers of Jefferson's plan desired? Their actions and their letters make plain that they wished a government which would, in the words of Richard Henry Lee, insure "more perfect security of Peace and property among the rude people who [would] probably be the first settlers there," one "more tonic" than the governments of the Atlantic states as they then were.¹³⁰ They also wished a government so closely controlled by Congress, and of such a character, that it would give assurance of safety against frontier defection. It was the very purpose of Monroe's committee from the beginning—certainly of some members, if not Monroe—to repeal Jefferson's ordinance¹³¹ and establish a stronger government that would rule, and not be a creature of, the border population. To a large extent they attained these two objectives. By provisions assumed to bind the original states (and so Congress), the territories, and the new states formed therefrom, they had *purportedly* put fundamental rights of person and property beyond *all* interference. They had also framed a highly centralized government.

trade lists of books published. Justin Winsor used the title: *The Westward Movement: the Colonies and the Republic* . . . (1897). One finds the word used in a charge to a grand jury in Mississippi Territory in 1800—*American State Papers, Miscellaneous*, 1: 238; likewise in a communication to the Attorney General of the United States from some acquaintance in Louisiana Territory in 1805—Carter, *Territorial Papers*, 13: 326. Governor St. Clair repeatedly referred to the Northwest Territory as a colony, particularly in an able letter to the Secretary of the Treasury in which he made clear (anticipating arguments of Webster) that it was "not a part of the United States" (united states), but "a dependent colony" thereof—W. H. Smith, *St. Clair Papers*, 2: 69, 70, 379-84; Carter, *Territorial Papers*, 2: 523. It seems highly probable that "colony" and "colonial" were common usage during at least two or three decades after passage of the Ordinance. Chief Justice Taney, in his opinion in the Dred Scott case, contrasted "colony" and "territory" on the doubly unsound basis that the former word connoted unrestrictedly arbitrary power in the suzerain, and that Congress did not hold such power over the territories—60 U.S. 446-47. C. E. Carter has recently briefly sketched "Colonialism in Continental United States" in *The South Atlantic Quarterly*, 47 (1948): 18-28. I understand that such language was long taboo in Washington as respected official publications. For E. S. Pomeroy's recent monograph see *post* n. 197.

¹³⁰ Letter of July 30, 1787 to William Lee—Burnett, *Letters*, 8: 629. In another of July 15 to Washington he wrote: "it seemed necessary, for the security of property among uninformed and perhaps licentious people as the greater part of those who go there are, that a strong toned government should exist, and the rights of property be clearly defined"—*ibid.* 620.

¹³¹ Though this fact, and the purpose, are clear on the record I have noted only one statement elsewhere, and that only on the fact alone: "It was the purpose of the new movement to supplant Jefferson's ordinance of 1784"—Justin Winsor, *Westward Movement*, 281.

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How extreme their ideal was can be judged by the statement of Nathan Dane: "We wanted to abolish the old system and get a better one for the government of the country, *and we finally found it necessary to adopt the best system we could get.*"¹³² Of the several restraints imposed by Jefferson's ordinance, for the protection of the Confederation and of federal interests, upon the territorial government which it created there was only one which Dane did not carry over into the Ordinance of 1787.¹³³ That was the one which required the government in both its temporary and permanent forms to be "republican."¹³⁴ The Ordinance *did* require that the constitution framed for a new state at the time of admission to the Union should be republican.¹³⁵ Moreover, in the preamble to the compact

¹³² Letter of July 16, 1787 to Rufus King—C. R. King, *Rufus King*, 1: 289.

¹³³ See *post* n. 370.

¹³⁴ Compare *Jour. Cont. Cong.* 26: 277 and 32:341. See ccliv *ante*. Between power to choose laws of an original state under which to live, and even to alter these, and the requirement that government be republican there was a conceivable inconsistency. Clearly, Jefferson considered it negligible; but

¹³⁴ Compare *Jour. Cont. Cong.* 26: 277 and 32: 341. See ccliv *ante*. Between

¹³⁵ It added, though this was outside the compact of Virginia with the Confederation: "and in conformity to the principles contained in these Articles"—article 5, *Jour. Cont. Cong.* 32: 342. This requirement was not in Jefferson's ordinance when passed—*ibid.* 26: 277-78; but in Howell's letter cited *ante* n. 53, at 480, he stated as approved in committee the requirement that the new state's constitution "be agreeable to the spirit of the Confederation." And Jefferson's ordinance actually made admission subject to the proviso that "the consent of so many states in Congress is first obtained as may at the time be competent to such admission"—*Jour. Cont. Cong.* 26: 278. In short, nobody seemed to realize that no actual condition could be imposed other than what was stipulated in Virginia's deed of cession. See *ante* n. 54.

As regards the condition of "republican" government, it must be remembered that Jefferson's ordinance called the territorial organizations "states," as they would be called in the language of political science; and this was regular usage in state papers of the 1780's—*ante* ccliv-vi, clxxii-iii. They all stated this condition; and, remembering that none of them assumed a pre-admission stage of preparatory territorial government (*ante* at notecall 100), it is clear that one requirement covered all stages of government. The compact created by acceptance of Virginia's cession deed contained two conditions only; that the territory be organized into "Republican States and admitted members of the foederal union, having the same rights . . . as the other States," and one fixing their number (later altered, *ante* n. 64). Jefferson had signed Virginia's deed, knew that the conditions in his ordinance were not in the cession compact, therefore wanted then *made* compacts—*ante* n. 54.

Looking at the matter as of 1784, and at the seven conditions in Jefferson's ordinance listed *ante* ccliv-vi, it would seem that one of them (no. 2 as there listed) constituted no restraint upon the territorial legislature, was a mere declaration of policy, and may be disregarded. Of the others, two (nos. 1, 7) were explicitly limited to the pre-admission period; the other four could of course be effective by congressional action only during that

there is an ambiguous reference to "these republics" which might refer either to the territory or to the future states creatable therefrom. Nevertheless, it appears a possibility that the revisers of Jefferson's plan did not wish to commit themselves, as regarded the territory, to a republican standard; and, waiving the question whether the territorial government provided for in the Ordinance *was* republican, their reason probably was that part of them had wanted a government to which that doubt would be even more applicable.¹³⁶

What was wanted, by some of the revisers and by some other members of Congress, seems to be plain enough: a government by "magistrates" or commissioners named by that body, probably charged with duties broadly stated and possessing powers not specifically defined. Those who held this view had made a stand for it in 1784 just before Jefferson's report was approved. It was moved,

period, although under the Constitution they actually bind all members of the federal Union.

As Congress received in 1789 absolute power over the territories, conditions set on their governments would thereafter have served no purpose. As regards conditions supposedly imposed on states, none which would really affect their equality with other states are valid; but a condition ostensibly placed on a particular state may happen to be one which in fact binds states because of their relation to the federal system, and such a "condition" is valid—not as a condition, but as a principle of constitutional law correctly stated. As said above this was true of four of Jefferson's conditions; it would likewise have been true of two more (nos. 1 and 7) had he not limited them to the period of territorial government; and even the last remaining "condition" (no. 2) was certainly made a leading principle of the Constitution by the Civil War. The recognition of these as basic principles of federalism illustrates Jefferson's statesmanship.

¹³⁶ Justin Winsor seems to have thought that the Ordinance assured the territory a republican government, and also that this was strengthened by the "provision which allowed [rather, *required*], as was permitted in the ordinance of 1784, the adoption of the laws of any of the older states"—*Westward Movement*, 287. This is reasonable, and is possibly the explanation. Speaking strictly, Mr. Winsor's suggestion is not beyond question. The Ordinance of 1787 permitted adoption of laws from one or another state, selectively; Jefferson's gave permission to choose the "constitution and laws" (seemingly, *all* laws) of any *one* of the original states. The latter would have assured a republican government—at least in 1784; it is quite possible that the former would not. But of course in actuality what Mr. Winsor said was true.

The fact that the guaranties given in the Constitution to the states were not given to the territories was the plainest evidence (though many other things were also evidence) that the Constitution related to a federal system of which the territories were no part. In only twenty-six words it referred to them—as something apart, and as "property"—for Congress to govern. The federal government would protect *them* against invasion or domestic violence; it could insure them a republican government. But must it? In Thomas Hart Benton's opinion they had, up to 1857, "never been

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namely, "That till such time as the settlers . . . shall have adopted the constitution and laws of some one of the original states . . . for a temporary government, the said settlers shall be ruled *by magistrates to be appointed by . . . Congress*, and under such laws and regulations as . . . Congress shall adopt." This motion was decisively defeated.¹³⁷ But it was under these circumstances that another amendment *was* adopted, namely: "That measures . . . necessary for the preservation of peace and good order among the settlers . . . until they shall assume a temporary government, as aforesaid, may, from time to time, be taken by . . . Congress."¹³⁸ As already said, the limitation of such governmental action to occasional measures taken for a limited purpose indicates the view of members in extreme opposition to those desiring rule by magistrates. The view of the former originally prevailed.

The views of the conservative group were not abandoned. Opportunities for their expression arose in considering the government of the Illinois Country. They influenced Monroe, who led in abandoning Jefferson's governmental plan; they influenced Nathan Dane, who followed Monroe in that work and had effective control of the final stages of drafting the Ordinance of 1787; and through both of these men they influenced the character of that enactment. In the petitions that came to Congress from the French settlements the prayers and complaints emphasized the office of their magistrates. In all discussions of their needs in Congress it was therefore at first assumed that a magisterial system must be the basis of any relief

governed on republican principles"—*Dred Scott Case*, 26-27. Certainly Louisiana (*ibid.* 55-56) and Florida (*ibid.* 72-73) had governments despotic in principle; and one need not consider California or overseas "possessions." Speaking of the Articles of Confederation, the Ordinance of 1787, and the Constitution, the Supreme Court—in *Downes v. Bidwell* (1900), 182 U.S. 240, 250—observed: "in relation to these three fundamental instruments that it can nowhere be inferred that the territories were considered a part of the United States." Compare Governor St. Clair in W. H. Smith, *St. Clair Papers*, 2: 378-84; Webster (*arguendo*) in *Amer. Insur. Co. v. Canter* (1826), 1 Pet. (26 U.S.) 511; colloquy of Webster and Calhoun in 1849 quoted in part *ante* n. 233 of Sec. II

¹³⁷ "On the question to agree to this amendment" the yeas are given as 6, noes 1, and three states divided; but the question actually voted on was: Shall the matter stand as it is? Roger Sherman and James Wadsworth of Connecticut gave the one vote for the amendment; the states whose representatives were divided were New Hampshire, New York, and Rhode Island. April 21, 1784—*Jour. Cont. Cong.* 26: 259-60. An attempt to secure reconsideration of this vote on April 23 was defeated—*ibid.* 274-75.

¹³⁸ *Ibid.* The vote was not recorded.

afforded them. This was a sound premise. Though Congress, had it realized the role of priest and commandant in their administrative system, could not have sent them such officials, it could have supplied the essence of the system under the name of magistrate in our political sense of that word, or under the name of a commissioner; and this is precisely what congressional plans contemplated down to the enactment of the Ordinance of 1787. In dealing in the two years preceding its adoption with petitions for the establishment of effective government in the Illinois Country, the following actions have interest in connection with the assertions made at the beginning of this paragraph.

A committee report made in February 1785 recommended simply that Congress send to Kaskaskia a commissioner "charged to use his best endeavours to suppress those disorders and irregularities of which the said Inhabitants complain. And that in the exercise of his Authority"—*not otherwise defined*—"and the administration of justice he pursue the mode which he may judge the best calculated to quiet the Minds of those people and secure their attachment to the foederal government."¹³⁹ This recommendation being referred to another committee, it reported what could have been a very effective temporary plan if kept simple, but which was ruined by impractical elaboration. It displayed a notable thirst for information respecting the Illinois Country coupled with an entirely logical inappreciation of the difficulties of its problems. It provided that a commissioner be sent thither for three years; imposed upon him duties, with respect to its past problems and current affairs, whose performance would have required the diligent attention of half a dozen able men; required him to do inconsistent things; required him to do impossible things; but assumed him to be endowed with talents (including a knowledge of French, and to some extent of Virginia law) adequate to the performance of all these obligations. Heavy duties were also placed upon him that lay outside ordinary governmental functions. Within these, the report assumed him to possess legislative powers seemingly unlimited save as respected personal rights and personal property; gave him large judicial powers; assumed in him almost unlimited executive powers. There were no provisions for self-government ex-

¹³⁹ Report of Feb. 15, 1785; committee—Hardy, C. Pinckney, Benson, Williamson, Howell; *Jour. Cont. Cong.* 28: 67-68, also in *I.H.C.* 5: 370.

cept that elected magistrates were to try civil controversies not affecting the title to land and were to sit with the commissioner in the trial of criminal cases; and that local officials, appointed by him with the advice and consent of the magistrates, were to execute "their [judicial?] decrees." The first report had recommended the stationing of federal soldiers in the settlements; this report, instead, charged the commissioner to "arrange, officer and command" a militia.¹⁴⁰

All this was more or less in accord with what the French settlements had been accustomed to in the past in the way of government,¹⁴¹ and if adequate means had been provided for performance of the tasks assigned, the plan might have served for a brief time a useful purpose. A population of predominantly foreign customs called for special treatment, as Congress later realized in the case of Louisiana, for which it made special provision.¹⁴² The fundamental problem of the Illinois Country differed, too, essentially from that of the American border settlements in that the French *wanted* government; indeed, wanted to be governed paternally. However, one duty of the commissioner was to "explain to the inhabitants of the said district, such

¹⁴⁰ Report of March 14, 1785; committee—Livingston, McHenry, Howell, Read, Monroe; report in *Jour. Cont. Cong.* 28: 155-57 and *I.H.C.* 5: 371-73. The election of magistrates was derived from Virginia's act of Dec. 9, 1778 by which the County of Illinois was created. That very simple enactment would have been a useful model. The governor appointed a county lieutenant "or commandant in chief," who appointed at will "deputies, militia officers, and commissaries." But "all civil officers to which the said inhabitants have been accustomed, necessary for the preservation of peace and the administration of justice" were to be elected—Hening, *Statutes*, 9: 553. At that time in all other counties county judges were appointed by the governor—*ibid.* 5: 489; likewise, justices of the peace—*ibid.* 9: 117. All this is derived through A. C. Boggess, *The Settlement of Illinois, 1778-1830* (1908), 9, 15.

¹⁴¹ See Philbrick, *Laws of Indiana Territory* (*I.H.C.* 21), ccxii-ccxxii.

¹⁴² This is what had been done by Great Britain in the Quebec Act—V. Coffin, *The Province of Quebec and the Early American Revolution: a Study in English-American Colonial History* (1896), and, more summarily, "The Quebec Act and the American Revolution," in *Amer. Hist. Assoc. Report*, 1894: 275-76. Mr. Pease renewed the old-time emphasis upon the fact that the Quebec Act established (on paper) Catholicism in the Northwest—T. C. Pease, "The Ordinance of 1787" (1937), *Mississippi Valley Historical Review*, 25: 175. Quite modern in expression, at least, is Albert Jay Nock's view (which he assumed was shared by our ancestors and incited them to revolution) that the proclamation of 1763 was an attempt by Great Britain "to limit the exercise of the political means in respect to rental values"—that is, to bar land speculation (American, at least) from the Northwest: *Our Enemy, The State* (1935), 115-28.

... proceedings of . . . Congress, as respect the same, and endeavour to form their habits for the reception of a free republican government." It should have been entirely clear that the only way to learn self-government was through an opportunity to practice it.

James Monroe was a member of the committee that submitted the foregoing report, but it would seem he did not like it, for he arrested by motion immediate action of the nature proposed, and the ultimate effect was to prevent it altogether. It would seem also that William Samuel Johnson agreed with him, for they were two of the three members of a committee from which came the motion in question. He probably did object to the plan's indefiniteness; nevertheless his alternative was probably offered for tactical reasons. Monroe's objection may have been to the plan, for he suggested an alternative; or it may have been to the likelihood that Arthur Lee would be the commissioner. Since the stated objection was a rather absurd one, which Congress ignored, and belief in which is nowhere indicated in his letters, it seems probable that he was primarily motivated by a desire (for public, not personal, reasons) to bypass Lee, and in this—if it was his intent—he succeeded.¹⁴³

In the report above described, the first recommendation relating to the proposed commissioner had been "that . . . he be invested with full power to examine into the titles and possessions of those Inhabitants of the [Illinois] country¹⁴⁴ whose rights were designed to be saved by the treaty entered into with them by Genl. Clarke" in 1779, and which had been guaranteed to them by the compact between Virginia and the other united states.¹⁴⁵ Monroe's committee, having occasion to report on matters relating to commissioners charged with making Indian treaties that summer at Vincennes, went out of their way to remark: that "when they consider the very important interests which the States have in the Western Country . . . your Committee take the liberty to suggest" that "the origin and extent" of the in-

¹⁴³ See his remarks and Jefferson's on Lee in Monroe to Jefferson, April 12, 1785 and Jefferson's reply—Burnett, *Letters*, 8: 91, 92 n. 16. Lee was elected but he resigned ten days after Monroe's motion was made—*Jour. Cont. Cong.* 28: 394 n. The reason given by him was rheumatism.

¹⁴⁴ This task alone later required the time of two land commissioners at Kaskaskia for several years. See Philbrick, *Laws of Indiana Territory (I.H.C. 21)*, lxv-c.

¹⁴⁵ On the misconceptions that these loose words permitted see *ante* at notecalls 102 and 103 of Sec. III.

habitants' rights "be fully ascertained" by the *treaty* commissioners "during their residence" at Vincennes, by obtaining from them "authentic documents thereof." Of the ignorance in Congress of western geography and conditions in the Illinois Country which these recommendations illustrate Monroe was apparently not so acutely aware as he should have been, and as some others were.¹⁴⁶ But he must have realized the difficulty to some extent, for a desire to lessen it was seemingly the underlying reason for his western trip a few months later.¹⁴⁷ The second resolution of Monroe's report was an equally striking illustration of this same ignorance. It was: that "no government being as yet established over the said Inhabitants and settlers upon the principles of the resolutions of the 23d of April 1784" (that is, Jefferson's ordinance), the treaty commissioners "advise and assist them in forming a temporary government upon the principles of said resolutions." To do this, it should be remembered, would have required adoption by these French people of the constitution and laws of some one of the original states under which they wished to live!

The first of Monroe's recommendations was adopted. The second was not.¹⁴⁸ This might mean that Congress did not consider the Illinois settlements ready for "temporary" government in the sense of that phrase as used in Jefferson's ordinance; or it might mean only that the duty suggested was not one that the treaty commissioners should undertake; both views would have been sound, and as above suggested, the proposal was probably not seriously made.

At any rate, this consideration of the Illinois problem seems to have raised doubts in Monroe's mind as to the merits of Jefferson's plan even for the Northwest. It was shortly after these events, and in advance of the western tour (which increased his doubts) that he expressed to Jefferson his uncertainty as to "what authority Congress

¹⁴⁶ "The government of the settlements on the Illinois and Wabash is a subject very perplexing in itself; and rendered more so by our ignorance of many circumstances on which a right judgment depends." Madison to Jefferson, April 23, 1787—Burnett, *Letters*, 8: 589; *Writings*, 2: 357; *Papers*, 2: 639.

¹⁴⁷ He was not one of the commissioners to negotiate a treaty with the Indians on the Ohio in Sept. 1785 but planned to be at that place—letters to Jefferson of Aug. 15 and 25 (on which day he started from New York)—Burnett, *Letters*, 8: 187, 202.

¹⁴⁸ Report of May 3, 1785—*Jour. Cont. Cong.* 28: 330-33, 461-62. An attempt to revive the report of March 14, 1785—*ante* n. 140—which Monroe had pushed aside was made in Dec. 1785, but failed—*ibid.* 28: 907-8.

will exercise over the people who may settle within the . . . new States previous to the establishment of a temporary govt. whether they will leave them to themselves *or appoint Magistrates over them.*'¹⁴⁹ It will be noted that his doubt was as to whether Americans on the border should have "magistrates"; if the surmise offered above be sound, he was satisfied that the French settlements should. Also, it will be noted that at this time he was still clinging to Jefferson's two stages of pre-admission government. We have seen that he returned from the West "with a conviction of the impolicy of our measures respecting" it, particularly the provision for small states,¹⁵⁰ and that it was left to him to begin the reform of Jefferson's plan. We have also seen that when his committee was appointed it was charged with consideration of new memorials from Illinois as well as with the general problem of territorial government.¹⁵¹ Consideration of the latter by his own and succeeding committees eventuated in the adoption of the Ordinance of 1787. No official record of attention to the other subject appeared until Monroe, in August 1786, submitted a recommendation that the inhabitants of Kaskaskia be informed that Congress had under consideration a governmental plan "for the said district" and that its adoption would be delayed no longer than its importance "and a due regard to their interest" might require.¹⁵² This plan was the inchoate Ordinance of 1787.

The situation, then, was as follows: (1) Complete repeal of Jefferson's plan had long since been recommended by Monroe. In particular, its first stage of "temporary" representative government, under laws the settlers could choose, but did not enact, was gone; Monroe had decided that the American settlers of the Northwest were not to be "left to themselves," but to be governed, until fit to make their own laws, by Congress. (2) He had also decided that both the American border and the Illinois Country could and should be governed in the same manner. And (3) since there is every reason to believe that he considered a *strong* government essential for Kaskaskia (even though he may well have considered the commission government proposed the preceding year to be too loosely drawn to be

¹⁴⁹ June 16, 1785—*Writings* (Hamilton ed.), 1: 87; Burnett, *Letters*. 8: 144.

¹⁵⁰ Letter to Jefferson, Jan. 19, 1786—*ibid.* 285.

¹⁵¹ *Ante* n. 111.

¹⁵² Aug. 24, 1786—*Jour. Cont. Cong.* 31: 563.

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safe for either party), we can rest assured that he considered his *general* governmental plan both definite and strong.

It was not, however, strong enough to suit Nathan Dane; and here we reach the end of this digression on matters of the Illinois Country.¹⁵³ Memorials continued to pour thence into Congress, unaffected by the reassurance given by Monroe's report; for the old abuses continued unabated. Madison found them "infinitely embarrassing"¹⁵⁴—and that throws light on a report by him, shortly to be mentioned. If Monroe did not feel so he must have had a great pride of opinion. In the spring of 1787 two of these petitions were referred to a committee of three, of whom Madison was one and Dane soon became another. Their report, *written by Dane*, was based on the belief that "Congress ought without delay to provide for the administration of Government and for forming some additional laws in those settlements." It was merely a revision, but an excellent one,¹⁵⁵ of the Livingston report of 1785 which had recommended commission government. It somewhat increased the power of the local magistrates and the application of local law and custom.¹⁵⁶ By one new provision the commissioner and a majority of the magistrates were empowered

¹⁵³ *Post* cccxxvii-viii.

¹⁵⁴ Letter of April 22, 1786 to E. Randolph—Burnett, *Letters*, 8: 588. Mr. Burnett remarks in his preface to the volume: "It was probably a renewal of these complaints, more than anything else, that induced Congress once more to give its attention to the form of a system of government for the western territory"—*ibid.* xli.

¹⁵⁵ With admirable good sense Dane omitted: (1) the duty to "cause to be surveyed every tract of land . . . claimed or possessed," which was an utter impossibility in those years; (2) the inconsistent duties to "adjust interfering claims among the settlers" and (3) to "assign Lands as well to those as to others who shall migrate thither"; (4) the duty to "endeavour to form their habits for the reception of a free republican government." And finally, (5) the commissioner was relieved of a major portion of the immense burden of making "early and accurate returns to Congress, of the nature, advantages and disadvantages of the Country, the number of its inhabitants, their military force, their customs, and their dispositions with respect to the United States, their wealth, agriculture and commerce"—both as to the settlements east of the Mississippi and those "in his vicinity on the Western side." Despite these omissions Dane should undoubtedly have omitted more.

¹⁵⁶ The report of 1785 empowered the commissioner alone, that of 1787 the commission and a majority of the magistrates (all being summoned to attend), to decide controversies over land titles; in both cases according to local law and custom. In criminal cases the role of Virginia law was increased; but whereas the report of 1785 made the criminal court consist of the commissioner plus not less than three magistrates, that of 1787, read literally, made it consist of the commissioner plus a majority of the magistrates—all of them being summoned in both plans.

to make and alter laws, subject to disapprobation by Congress.¹⁵⁷ This last provision was substantively and administratively preferable for Illinois to the provision in the draft of the Ordinance of 1787—and which first appeared at the same time—which empowered the governor and judges to “adopt” statutes of the original states, subject to like disallowance. This is very likely one detail in which Dane had hoped for a governmental plan for the Northwest better, from his point of view, than the Ordinance provided. That his ideal was not merely a commissioner with dictatorial powers is evident from the fact that he proposed in the Kaskaskia report to increase the power of the local magistrates. But it seems extremely likely that he did favor a commissioner type of government for the Northwest Territory, and that in the form actually adopted he would have preferred to empower the governor and judges to *make* laws.¹⁵⁸

Two days after his report General Parsons presented for the Ohio Company its petition for the purchase of lands, the general Ordinance was hurried toward its final form, and nothing was ever done with the Kaskaskia report. The fact that Madison presented it (and presumably concurred in it, for that would seem much more probable, were there any dissent, than concurrence by the third member¹⁵⁹) is certainly some evidence of its soundness. Had the plan been adopted, the chaos in the Illinois settlements would have been ended long before St. Clair finally got there in 1790, and the land titles might possibly have been settled—not with the same scrupulous legality, but perhaps with fairness and less unrest—two decades earlier.

¹⁵⁷ The report was of May 7, 1787—*Jour. Cont. Cong.* 32: 266-69. The draft of the general governmental Ordinance for the Northwest as it was printed on May 9 contained the provision that for the Northwest Territory the governor and judges should “adopt” laws of the original states, and this was unaltered in debates of May 10 and July 9—*ibid.* 281.

¹⁵⁸ Compare General Gage's views of proper government for the western country, in letter of May 15, 1768 to Secretary Barrington—C. E. Carter, ed., *The Correspondence of General Thomas Gage* (1931—), 2: 473. Dane was a member of Monroe's committee from July 19 to Aug. 7, 1786—*Jour. Cont. Cong.* 30: 418 n. 1, 31: 502 n. 1. When Monroe and Rufus King were dropped in a reconstitution of the committee, Dane was again added, Sept. 18, 1786—*ibid.* 667 n. Monroe thought him “illiberal”—*ante* at notecall 73. Probably this opinion, expressed before Dane joined his committee, was strengthened by that association; provisions clearly Dane's, others probably his, appeared in the draft as soon as Monroe left the committee.

¹⁵⁹ Abraham Clark—see the *Dictionary of American Biography*. He would certainly have revolted against the abuses of which the petitions complained, but would he have been willing to approve a commissioner of such large powers?

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It is an interesting fact that when Monroe reported to Jefferson the complete abandonment of the latter's plan for virtually immediate self-government, and its replacement by a government not merely colonial in character but of a peculiarly strict and illiberal variety, Jefferson—who had been sent to France almost immediately after his ordinance was passed¹⁶⁰—made on that point no protest whatever. His comments on the first letter of Monroe quoted above were limited to the abandonment of the system of very small states (decreed by Congress, but approved by him); and in fact the conservatives also, in their letters of the time, similarly accentuated the same problem, saying much less of government.¹⁶¹ An inability for some months to write made an answer by him to the second letter quoted impossible at the time,¹⁶² but he never returned to the subject. This is very remarkable, much more so than appears without reflection. It is true that he concluded his remarks on Monroe's first letter with the self-depreciative remark that he respected his friend's opinion, and his knowledge of the western country, too much to be "ever [over ?] confident" of his own. But, nevertheless, he *did* return to this subject of large or small states; and moreover—as respected closure of the Mississippi, at least—he asserted, and no doubt possessed, an excellent knowledge of the western people.¹⁶³ Now notice: Jefferson demanded in all matters equal respect for their interests and those of the East; otherwise, he feared their loss and the Union's disruption. Why did he challenge Monroe on the choice of large new states over small, but not on the choice of a colonial government? Why did he assert complete confidence in his own judgment of the western settlers as respected navigation of the Mississippi, but not as respected self-

¹⁶⁰ He was elected minister to France on May 7, left Congress on May 11, sailed from Boston on July 5.

¹⁶¹ Jefferson's views rested on theoretical grounds stated *ante* n. 68; letter of July 9, 1786—*Writings* (Ford ed.), 4: 246-48. The two matters could not be completely separated. My impression is that problems of government were primary with Jefferson and even with Dane, but that various other men were more interested in the politics of the states to be created. Very plainly, Jefferson wanted the states small because he believed that only then could good government be maintained in them and the Union be secure against dangers from them. See the statements of his long-pondered views made in letters of Jan. 31, 1814 and Feb. 2, 1816 to J. C. Cabell—*Writings* (Memorial ed.), 14: 84, 421-23. Again, as to Dane, see his letter of Aug. 12, 1787 to Rufus King, quoted *post* at notecall 214.

¹⁶² *Writings* (Ford ed.), 4: 331.

¹⁶³ See the quotations in n. 68 *ante*.

government? It was certainly not because the question of the optimum size of states was speculative and arguable, and discussion of it useful because a wrong choice would be, in practical fact, irremediable; for all that would be equally true of a choice of government—if one concedes it to be arguable at all as respects the desirability of self-government. One astonishing fact is that, by implication, he *did* recognize it to be arguable. Another astonishing thing is that although he considered that closure of the Mississippi would not be “managing their interests honestly & for their own good”—or treating them with that equality which would hold them to the Union as friends¹⁶⁴—he gave no indication that treatment of them as colonials, with at most no more freedom than had been enjoyed by the original states as colonies under the Empire, was not equality but subordination to the interests of the East.

But, after all, to what purpose could Jefferson, across the ocean, protest when his best friends repudiated his principles?—particularly since they did so only *sub silentio*, referring solely to the advantages of the new plan over the old as respected the size of states.¹⁶⁵ Naturally, too, under these circumstances he did not include it among the services he had rendered his country, nor even allude to it in his autobiography.¹⁶⁶ But surely he could never have been brought to doubt the validity of the principles on which his plan had been based.

Whatever may be true of Jefferson, it would seem (if their literary remains fairly represent their opinions) that *the distinction between a generous or an illiberal government in the West was not one that seemed of great importance* in the minds of most easterners of the governing class, northern or southern. Monroe's committee, to be sure, borrowed from Jefferson's plan the word “temporary” (without anything it fitly described), and added some words of their own about “infancy” and learning to “act for themselves”; but these small artifices and homilies indicated no sincere acknowledgment of the right of self-government. That right, as already remarked, is significantly absent from the compacts of the Ordinance in which

¹⁶⁴ See letters cited *ante* n. 122.

¹⁶⁵ Compare Carrington to Jefferson, Oct. 23, 1787—Burnett, *Letters*, 8: 660; Virginia delegates to Governor Randolph, Nov. 3, 1787—*ibid.* 672. Compare Monroe to Jefferson, May 11, July 16, 1786—*ibid.* 359-60, 403-4.

¹⁶⁶ As Mr. Ford stated (*loc. cit.* in n. 171 *post*); see his *Writings* (Ford ed.), 7: 475.

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Nathan Dane cataloged his articles of civil faith, and which Congress approved. They only guaranteed a good government by those good enough to govern. The rights guaranteed were so important and the guaranties so well observed that *the insecurity of the guaranty was unnoticed* by those who through generations have lauded the Ordinance as an epitome of American civil liberties. Of that laudation it was unworthy; it lacked the fundamental protection on which all such liberties depend.

However, accept at face value the above-quoted words of palliation, and the omission of the right of self-government appears necessary; and the acceptance of this reactionism of the Revolutionary decade has proved easy to American smugness. As John Sharp Williams complacently put it after the territorial system had run its long course, the people were held as wards "while being educated for statehood."¹⁶⁷ This is the traditional view, a thousand times assumed or asserted in Congress until the continental territorial system was a thing of the past, and generally, with much less excuse, accepted by historians. Even Dr. Farrand, our foremost authority on federal legislation on the territories, gave it currency.¹⁶⁸ Nevertheless, no matter how many names be cited to support it, such a view appears to be quite irreconcilable with the facts—as respects the Northwest Territory, for present purposes—relating to the origins of its popu-

¹⁶⁷ In his *Thomas Jefferson* (1913), 223. Similarly, James Schouler: "How has the Federal government . . . trained up its territorial offspring in political allegiance? First, . . . by erecting territorial governments . . . and, under Federal officers, keeping the early settlements well in hand and popular rights protected until there are loyal inhabitants"—note these words—"sufficiently numerous to draft a State constitution . . . and apply to Congress for full admission"—*History of the United States* (rev. ed. 1894), 1: 110. And in a recent paper which, the writer believes, greatly overestimates the prevalence of correct ideas concerning the Ordinance, Professor Billington speaks of it as "inaugurating an unbelievably liberal colonial system: one which provided for the political evolution of the colonies until they were ready to enter the mother country on equal terms"—R. A. Billington, "The Historians of the Northwest Ordinance" (1947), *Illinois State Historical Society Journal*, 40: 397.

¹⁶⁸ "The principles of territorial government today are identical with those of 1787, and those principles comprise *the largest measure of local self-government compatible with national control*, a gradual extension of self-government to the people of a territory, and finally complete statehood and admission into the Union on a footing of equality with the other States"—Farrand, *The Fathers of the Constitution*, 77. But how could he write thus in 1921, in view of what he had written in 1908?—see *post* at notecall 296.

lation, the nature of its governmental problems, and the actual administration of its local government.¹⁶⁹

George Bancroft, in the last revision of his *History*, declared that "The design of Jefferson marks an era in the history of universal freedom."¹⁷⁰ That it *would* have done so if it had actually been made the basis of our territorial system would seem to be incontestable. The statement by Paul Leicester Ford—properly qualified on *that* point—seems true beyond question: "Next to the Declaration of Independence (if indeed standing second to that), this document ranks in historical importance of all those drawn by Jefferson; and, but for its being superseded by the 'Ordinance of 1787,' would rank among all American State papers immediately after the National Constitution."¹⁷¹ His plan would have established from the beginning democratic self-government in every prospective member of the federal union. It was a plan consistent with our denunciations of British rule in the Declaration of Independence. And it would have been a grand substitute for colonial imperialism, of which the Ordinance of 1787 was only a petty reproduction.

However, great as were the merits of Jefferson's plan *as such*, it had little practical influence. Some of his admirers have given to it credit (or in some cases, from the writer's point of view, discredit) which cannot possibly be justified if any attention be given to the actual history of the territorial system.¹⁷² It was laid as a foundation

¹⁶⁹ See *post* cccxlv *seq.*

¹⁷⁰ *History* (last revision), 6: 117; *History of the Formation of the Constitution of the United States of America* (1882), 1: 156.

¹⁷¹ Jefferson, *Writings* (Ford ed.), 3: 430 n. Various other statements by Mr. Ford in this note are indefensible, and some are elsewhere criticized. He also says of the draft of the ordinance that "The clauses making this territory forever part of the United States and ending slavery in it after the year 1860 . . . are of small moment when compared with the system here for the first time established, that the inhabitants of the public domain were not to be held as subject colonies, but were *to be* given equal rights with the parent state"—P. L. Ford, introduction to Jefferson's *Writings*, 1: xxx, italics added. In the ordinance they *were* given substantially equal rights. If the "*to be*" refers to this treatment of them under the ordinance, the writer agrees. If it refers to the equality that was to be given on admission to the Union, *that* is equally true of the Ordinance of 1787, is of no peculiar merit in Jefferson's statute unless on the possibility noted *post* n. 172. The somewhat ambiguous passage just quoted is followed by the wholly fallacious judgment quoted in the next note.

¹⁷² "Jefferson's ordinance of 1784 was the basis on which the American plan of colonization was founded"—E. Channing, *History*, 3 (1912): 540. "The student of our political institutions will recognize in this ordinance of Jefferson's all the essential principles of the organization and government

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for that system, but save for a few parts removed from it and built into a new foundation it did not serve as such. If the spirit of a governmental system is its essence, there was no trace in our territorial system of Jefferson's ordinance; and if principles of actual government are considered, that enactment supplied none to the system. It would not be easy to find other plans of equally noble character, and so great in potential benefits, which have had so slight an influence. It did state certain principles respecting the relation between territories and the national government which are not stated in the Constitution, yet have always been enforced as law. But these principles, which were incorporated into the Ordinance of 1787,¹⁷³ have not been taken by the Supreme Court from either ordinance; like their first enunciators in the Confederation era the Court derived them from the logical necessities of a federal system.

III

Laudation of the Ordinance of 1787 has been equally immoderate and uncritical, and more abundant. Patriotic citizens might naturally assume that the organization of our territories provided in 1787 rested upon provisions wise in nature and exact in expression; that these were carefully adapted to local needs by local legislation; and that under the system so devised beneficent administrators nurtured a peaceful and orderly people in the practices of republican government. There has been much oratory, and not a little more sober writing, expressing such ideas. In truth, however, the picture so

of territories of the United States. . . . Its spirit influenced our Territorial governments for more than a century"—D. S. Muzzey, *Thomas Jefferson* (1918), 108, 109. "No [other] one enactment has had so vital an influence on the American union"—P. L. Ford, introduction to *Jefferson's Writings*, 1: xxx. James Truslow Adams refers to "Jefferson's fundamental idea of equal union, and not of an imperial control over the West." This was, indeed, his ideal even as respected the *pre*-admission "states" in his ordinance. But Mr. Adams did not have them in mind: "The idea . . . that the new states to be formed should not be 'colonies' but eventually admitted as states on an equal basis, which has been one of the most fruitful ideas in our whole political history was wholly Jefferson's own"—*The Living Jefferson* (1936), 165; italics added. The state papers of earlier date are of course full of this idea, but Jefferson's claim to *priority* seems strong and would to that extent sustain Mr. Adams; see *post* cccxv-xvi. Claude Bowers completely ignores any distinction between the two ordinances: "He had drafted the Ordinance of the Northwest Territory, which first gave an organized society to the states of," etc.—C. G. Bowers, *The Young Jefferson* (1945), 344; compare 342.

¹⁷³ Those discussed *post* n. 370.

presented has very little resemblance to realities. Nevertheless, the importance of the Ordinance as an act of national administration—as an *application* on a great scale of various national policies—as a *precedent* in the proclamation of personal rights under Anglo-American government and of other ideals—was so great as to justify much of the high praise it has received.

Daniel Webster magniloquently expressed doubt “whether one single law of any lawgiver, ancient or modern, has produced effects of more distinct, marked, and lasting character than the Ordinance of 1787.”¹⁷⁴ In saying this he almost certainly overemphasized the effect of the Ordinance on slavery. Mr. Schouler characterized it as “the last really brilliant achievement of a procrastinating, paralytic, dying assembly”; but if brilliant it may reasonably be called, it was certainly neither the last nor the most brilliant. He also declared that it “deserved to rank among immortal parchments, both for what it accomplished and what it inspired”; a tribute which it seems to deserve under the second head much more clearly than under the first.¹⁷⁵ Professor McLaughlin wrote that the enactment, “because of its wise provisions and liberal terms, has justly been considered one of the most important documents in our history.”¹⁷⁶

¹⁷⁴ *Works*, 3: 263; *Writings and Speeches*, 5: 263.

¹⁷⁵ James Schouler, *History*, 1: (Washington, 1880) 73, 100, (New York, 1894), 83, 111. As for the first quotation, unless one says “in some respects,” were not its acts of submitting to what many regard as the Federal Convention’s *coup d’etat*, and of submitting the new Constitution to the states both later and more brilliant? Compare E. C. Burnett, *The Continental Congress*, 694-97. As for the second quotation, it was probably based on misconceptions of the nature of the slavery article.

¹⁷⁶ A. C. McLaughlin, *The Confederation and the Constitution, 1783-1789* (1905), 120. Present-day thought regarding the Ordinance’s compacts may be judged by the views of two scholars expressed in connection with its one hundred and fiftieth anniversary. Mr. Quaife seemingly considers the “compact” articles as in fact examples “of the most solemn agreement known to political science,” and discusses them all on that basis, though he begins by disregarding their words, in recognizing only “two parties” as interested in them—M. M. Quaife, “The Significance of the Ordinance of 1787” (1938), *Ill. Hist. Soc. Journal*, 30: 418 *seq.* Mr. Pease, speaking as a guardian of the Ordinance on a memorial occasion, remarked that Dane “appropriated the great idea, original with Jefferson, of articles of compact”—T. C. Pease, “The Ordinance of 1787” (1937), *Miss. Val. Hist. Rev.* 25: 179. Both men evidently felt that the occasion called for actual interstate compacts, and it may be thought that Dane, in agreeing with Jefferson, appropriated his idea. But so far as any precise ideas regarding such compacts were manifested by Jefferson, Dane did not adopt them (*ante* n. 123 of Sec. III). In view of Mr. Pease’s words elsewhere (*post* n. 281) it seems doubtful whether he even distinguished actual interstate agreements from fictitious social compacts.

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Whether the reference in this opinion was to its compacts or to its other provisions is indeterminable from the context. The judgment invites the question, which provisions were wise and liberal? The compact articles might well be accepted as such, and probably could nearly all be shown to have done some good; most of all the slavery article in stimulating free-soil immigration. But all of them were influential chiefly because believed to be what they were not; and besides, as Justin Winsor said, though the Ordinance "was an embodiment [in its compact articles, solely] of current aspirations, . . . [it] had not a single turning-point in human progress."¹⁷⁷

The six principles taken from Jefferson to regulate the relation between the territory and the Union were forward-looking and important, and would become of immediate significance upon attainment of local self-government; but they were not new. The only parts of the Ordinance that were notably both new and forward-looking were Dane's provisions on intestate descent, the clause against impairment of contracts, and that regarding navigable waters of the territory.¹⁷⁸

The intestacy provisions followed, to be sure, state legislation. But Dane was notably conservative, while this legislation (establishing equal inheritance by all children and abolishing distinction between whole and half blood) was a particularly important contribution to economic and social equality, expressing and giving solidity to democratic tendencies in the distribution of land at the moment when great areas of confiscated Tory estates, the backlands of the Atlantic states, and now the vast acreage of the new federal territory, were available for settlement. The great importance of this portion of the Ordinance has been strangely underestimated.¹⁷⁹ Dane deserves very great credit for choosing the liberal view. He started with the simplest and most democratic rules of inheritance—far in advance

¹⁷⁷ J. Winsor, *Westward Movement*, 285.

¹⁷⁸ As regards the authorship of these respective clauses see *post* nn. 349, 363, 371.

¹⁷⁹ Not by Dr. Jameson. *The Revolution Considered as a Social Movement*, 49, 62. Nor by Professor Channing, who devoted to them as much space as to all the compact articles—*History*, 3: 545-47.

Scattered through Professor Osgood's volumes on the eighteenth century there are scores of pages that throw light on resistance to survivals of feudal tenure, and "squatter philosophy versus vested interests." See B. W. Bond, *Quit Rent System in the American Colonies* (1919), R. B. Morris, *Studies in the History of American Law* (1930).

of those prevailing in most of the states—an area which, great as it was in itself, was small in comparison with that in which the same rules were later established by “extension” of the Ordinance or by special legislation of Congress.¹⁸⁰ He was abundantly entitled to the lifelong pride taken by him in this accomplishment.¹⁸¹ It would be rashness to assume that the anti-slavery clause of the Ordinance made a greater contribution, or perhaps one as great, to the social fabric and commonweal of the country.

The second innovation, the clause against impairment of contracts—which was duplicated (eulogists of the Ordinance always say “copied”) in the new federal Constitution—outlawed any future concessions by state legislatures to the anti-creditor sentiment that had underlain much of the social turbulence of the Revolutionary period. The third innovation, and the six principles taken from Jefferson, have all continued as fundamental principles of national policy.

Aside from these few total or relative novelties the importance of the Ordinance consists merely in its being *an application* of national policies relating to the territories as public lands. The Ordinance did not declare any national policy respecting their sale; it did not provide for their use in payment of the federal debt; nor did it first provide for the spread of population under settled government. That government, however, it did provide; and it was therefore a great and forward-looking act in furthering the execution of the other policies.¹⁸²

Some writers, desirous of eulogizing our colonial (or territorial) system, have eulogized the Ordinance as having “established” it. In a sense this is of course true, since the system did have its practical initiation in the Northwest Territory, under the Ordinance. Nevertheless, the praise seems misplaced. The unique feature of our colonial

¹⁸⁰ George Elliott Howard wrote that “the planting of social institutions in the Northwest Territory, under the Ordinance of 1787” was “scarcely second in significance to any event in American annals”—*Introduction to the Local Constitutional History of the United States* (1889), 408. He was probably thinking of *free* institutions, and of the township and county organizations to which his book was primarily devoted. Nothing points to appreciation of Dane's contribution on inheritance.

¹⁸¹ *Post* n. 349.

¹⁸² Mr. Paxson has said that “alone among the acts of the old Congress this Ordinance of 1787 stands out as a great constructive measure”—F. L. Paxson, *American Frontier*, 66. It would seem that within the narrow field here in question, certainly the resolutions of Oct. 10, 1780 and perhaps the land ordinance of 1785 should take precedence over the Ordinance. Mr. Paxson, however, evidently considered it great and constructive in the field of government—*ibid.* 62-63, 66.

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system which these writers have wished to applaud—the provision for eventual admission of the territories as states into the federal Union—was established by two state papers which are certainly among the greatest of our national history: the declaration by Congress of October 10, 1780 which committed us morally to that great principle, and the detailed enumeration by Congress on September 13, 1783 of the conditions (that principle included) on which Virginia's cession would be accepted, which (Virginia agreeing) committed us legally to the principle and the system of March 1, 1784.¹⁸³ Eulogy should rather be bestowed on them than on the Ordinance. (And the caution may be repeated that although the system, as a working affair, was inaugurated by the Ordinance, one cannot find in its content *a trace* of the actual compacts that created and defined the system.¹⁸⁴)

In the opinion of a very high authority "The two great achievements of the Revolutionary epoch were (1) the establishment of governments limited by law and under obligation to protect individual liberty, and (2) the establishment in 1788 of a federal system based on law."¹⁸⁵ What was the relation of the Ordinance of 1787 (or of the territorial system generally) to these two achievements?

With the first it had no relation whatsoever.¹⁸⁶ Every provision of the Ordinance, compacts as well as others, was mere legislation by Congress, subject at any moment to amendment or repeal. If Con-

¹⁸³ *Jour. Cont. Cong.* 18: 915—Oct. 10, 1780; 25: 560—Sept. 13, 1783; 26: 115—March 1, 1784. See *ante* at notecall 171.

¹⁸⁴ See *ante* xci.

¹⁸⁵ A. C. McLaughlin, *Foundations of American Constitutionalism* (1933), 147. "What are the two salient or cardinal principles of the American constitutional system as we know it today or as it was a hundred and forty years ago? Plainly, first a principle of federalism, which means the distribution of powers among independent governments; and, second, the principle, embodied in institutions, of limited government—government that can legally act only within a prescribed field"—A. C. McLaughlin, in T. Sizer *et al.*, *Aspects of the Social History of America* (1931), 40. The system of American constitutionalism rests "on one main principle: government is subject to law"—*ibid.* 61. See also his original article: "The Background of American Federalism" (1918), *Amer. Pol. Sci. Rev.* 12: 215-40.

¹⁸⁶ Whether the territories are outside the Constitution save for the single provision that Congress may make rules and regulations respecting them; that is, particularly, whether constitutional restraints on Congress as against the states are also binding on it in governing the territories, are still open questions in the sense that the Supreme Court has not passed directly and conclusively upon them. In various opinions the powers of Congress have been referred to as unqualified. See W. W. Willoughby, *The Constitutional Law of the United States* (2d ed. 3 vol. 1929), sec. 243 and ch. 31.

gress exceeded its powers, its acts were void under the higher law whence its powers were derived—the Articles of Confederation or the Constitution.¹⁸⁷ But, as already emphasized, the provisions themselves, if valid, could restrain no political body other than the legislature and other branches of the territorial government. The greatest of all delusions respecting the Ordinance was the long-prevalent belief that Congress, either before or after 1789, could have embodied in that instrument any provision restrictive of its own powers, binding on the original states, or binding on new states when those should be created from the Territory.

The question regarding the relation of the Ordinance (or the territorial system generally) to the federal system must be answered in virtually the same manner. The federal system existed in an imperfect degree under the Articles of Confederation, and exists in a fuller and improved form under the Constitution.¹⁸⁸ It includes the Union (that is the federal entity or state known as the United States), the individual states, and the people of the several states, among which entities all sovereignty and governmental powers are distributed, as stated in the Tenth Amendment. The territories were wholly outside the federal system. There was a connection between that and the territorial system, but it was not organic; it was merely one of fact—that the latter system was the source whence the former ordinarily derived its new members. The Ordinance governed the people of the Northwest Territory. Later they were organized into several states and these were admitted into the Union. Congress chose to *recite* in the Ordinance that these two things should be done, but there was no operative force in the recitation. And if perchance officers of the Territory participated in the organization of the new states they did so as agents of Congress outside their functions with-

¹⁸⁷ *Ante* clxxxvi-ix. Though for convenience we speak of the Ordinance of 1787, the Ordinance actually existent and to be dealt with under the present government is that of Aug. 7, 1789, being the act which re-enacted the Ordinance of 1787, with slight changes "to adapt the same to the present Constitution of the United States"—Carter, *Territorial Papers*, 2: 203. One who looks in T. Roosevelt's *Winning of the West* for his ideas on the Ordinance of 1787 will find two curiously obscure passages of which the exact meaning is indecipherable; but it must be assumed he was praising the new and great principle of ultimate statehood for the territories (colonies),—and wrongly crediting that to the Ordinance—3: 260, 261.

¹⁸⁸ See Professor McLaughlin's lecture, "Some Reflections on the American Revolution" in T. Sizer *et al.*, *Aspects of the Social History of America*, 32 *seq.*

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in the Ordinance's governmental plan, which, as such, was not instrumentally involved in the act of the Territory's emancipation. Of course, however, these matters appeared different to readers of the Ordinance while it was believed that its "compact" articles were true compacts and had binding effect. To them, the Ordinance seemed to *create* federalism. Those historians who laud the Ordinance as "establishing" the colonial system would seem to be not wholly free from the effects of those old beliefs.¹⁸⁹

For years before the Ordinance of 1787 was passed there seems to have existed a universal assumption that new states should be organized in the West and admitted on an equality with the old. After October 10, 1780 the Confederation was morally bound to both of those acts if that region should become federal territory; after Virginia's cession on conditions specifically stated and accepted, the Confederation was contractually bound to do so; and by the Constitution the burden of the old Union's compact was made binding on the new.¹⁹⁰ Jefferson's ordinance was intended to be a performance of the obligation, but it was to the Ordinance of 1787 that the honor fell of actually giving it first performance. Manifestly, however, the Ordinance was not "the first conscious movement of the American mind toward the universal application of the federal principle . . . to the continent."¹⁹¹ It was far from being an early congressional enunciation of the policy; and the enunciation in it lacked any binding quality. Moreover, there seems to be good reason for accepting

¹⁸⁹ For example, speaking of the application by *Kentucky* to Congress for admission to the Union without prior territorial government (1792), Mr. Paxson says: "Thereupon there was debate upon the propriety of the formation of a state *with no more authority than the general provisions of the Ordinance of 1787*"—F. L. Paxson, *American Frontier*, 94; italics added. Professor Howard (*ante* n. 180 at 408) also characterized the Ordinance as "marking an epoch in the development of constitutional forms and principles." If he meant by the former phrase either (1) the political subdivisions of a state (counties and townships) or (2) federalism, it seems to mark no epoch whatever. As regards "constitutional principles" he was obviously attributing to the Ordinance's "compacts" a super-legislative character.

¹⁹⁰ It has been shown in the second section of this introduction that the vague language of the Constitution, declaring that Congress "may admit" new states, was deliberately chosen in order to exclude any assumption in unqualified form of a duty to admit, despite the fact that the duty did exist under the compact with Virginia. Its acceptance even in qualified form affords some evidence of contemporary democracy and of the strength of the revolt against our colonial treatment.

¹⁹¹ Alexander Johnston, "Ordinance of 1787," in J. J. Lalor, *Cyclopaedia of Political Science*, 3 (1904): 33, col. 2.

Herbert Adams' view that "federal unity with the great West was a Jeffersonian idea,"¹⁹² presented by him "to his own state before the Declaration of Independence, . . . [so that] if he did not originate it he was certainly one of those who held it first,"¹⁹³ and his embodiment of the idea in the ordinance of 1784 should for that reason, as well as because of that enactment's prior date, give the expression in 1784 precedence, as a matter of historical fame, over the repetition in 1787. The fact still remains that the later ordinance was the first actual and effective application of the policy, and one on so vast a scale as to presage its stability and success.

There is another point to consider before leaving this subsidiary relationship of the territorial to the federal system. Professor McLaughlin tells us that Jefferson's ordinance "embodied the two essential ideas of the American territorial system: (1) temporary or territorial government; and (2) ultimate admission to the Union on terms of equality with the older states."¹⁹⁴ As a statement relating to mere form that is correct; Jefferson's plan did provide for territorial government prior to admission to the Confederation, but that bald fact does Jefferson little credit, since some government was self-evidently necessary. On the other hand, if Professor McLaughlin's statement be understood to mean that Jefferson's provision for pre-Union government even remotely resembled "the territorial system" established by the Ordinance of 1787, that would be a misunderstanding, fortunately for Jefferson's honor. Consider for a moment the record. Even in the territorial system's final form it was not "essential" that a "temporary or territorial government" precede admission to the Union; in fact seven states entered the Union without it, although in each case for special reasons which usually showed that the requirement would have been wholly superfluous.¹⁹⁵ As already emphasized, neither in the acts of state by which the system was

¹⁹² "Maryland's Influence upon Land Cessions to the United States," Johns Hopkins *Studies in Hist. and Pol. Sci.* 3d series, 3, no. 1: 47 n. Same in *The Nation* (May 4, 1882), 32: 384, col. 1.

¹⁹³ Dumas Malone, *Jefferson and His Time*, 1 (1948): 412.

¹⁹⁴ A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government*, 3: 585 s.v. "Ordinance of 1784."

¹⁹⁵ Vermont, Kentucky, Tennessee, Maine, Texas, California, West Virginia; in addition to four of the original thirteen states that ratified the Constitution after the Union had come into existence by the ratification of the first nine—Virginia, New York, North Carolina, and Rhode Island.

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created, nor in any state or congressional reference to it (anticipatory or retrospective) for some years preceding 1787, was the first stage assumed as essential.¹⁹⁶ Until October 1783 there was nothing in any to suggest the necessity of what "temporary or territorial government" was made to mean by the Ordinance of 1787. Jefferson's ordinance did, as Professor McLaughlin said, create a territorial stage (in fact one of two divisions, temporary and permanent), but consider the differences under the two ordinances. Under that of 1787 there was, first, complete and general government by federal appointees; later, local self-government but still under rigid control by Congress positively and deliberately provided for. Under that of 1784 there would have been complete self-government from the beginning; first, under the laws of any state which the inhabitants *however few in number* should elect; second, under their own constitution; with *no* control by Congress provided for except *preceding* any election of self-government, and then only "from time to time" *if necessary* for the maintenance of order. Before admission to the Confederation, these political units, though Jefferson called them "states," would not have been units of the federal system. Of course, too, since the Constitution gave Congress powers to regulate the territories (doubtfully restricted if at all) in theory Congress could later have *asserted* direct control; just as it might later have *renounced* the control given it in the system established in 1787.

At any rate three things seem plain. One: that "federal unity with the great West" meant to Jefferson something very different from its meaning to those who—for that reason—discarded his governmental plan. Another: that interference by Congress in territorial affairs, which was the purpose and essence of the revisers' plan, would have been minimized by Jefferson's plan, and jealously checked by those enjoying self-government under it—if given adequate representation in Congress. And finally: that in so far as federal interference would have been checked (in fact virtually excluded), there could not have arisen under it the politics- and spoliation-ridden territorial administration that developed under the system of 1787.¹⁹⁷ Under Jefferson's plan the territorial system would have exer-

¹⁹⁶ *Ante* at notecall 100.

¹⁹⁷ See E. S. Pomeroy, *The Territories and the United States, 1861-1890: Studies in Colonial Administration* (1947).

cised a vastly preferable effect upon the admission of states, and a beneficial effect, reactively, upon the federal government.

But territorial government should be viewed, as Jefferson insisted, from the viewpoint of the territory's inhabitants. That dependencies held by the confederated states and settled by their own citizens should have been treated *better* than those states had been treated as colonies—for the sake of a decent consistency between principles and practice, if for no higher reason—would seem to be self-evident. Not so an assumption that if the new united states should acquire territory and set up territorial governments these should ultimately be admitted to the Union. Reasoning *in vacuo*, that would not seem to be a political necessity. But, as to that, the propriety of the action had evidently always been assumed, and the assumption testifies to the honesty of our protestations against British rule. There was no excuse in logic for the governmental plan of the Ordinance of 1787. There was nothing in it that deserves praise for being either new or good; nothing of the aspirations of the era; nothing but the old stuff of extreme conservatism. It did recognize those aspirations in its "compacts"—all *except* the one most important, and most characteristic of the time: self-government. At best there is only a partial truth in the statement that "it crystallized the principles of colonial organization about which men had been disputing for a generation."¹⁹⁸ It could not possibly deserve that description without a great addition of democracy in its plan of government. Rather, it seems fair to say, the fright over social disorders of the time ended debate; the conservatives,¹⁹⁹ completely dominant in Congress, passed a completely ungenerous and reactionary statute while in that state of mind.

¹⁹⁸ A. C. McLaughlin, *Confederation and Constitution*, 125.

¹⁹⁹ In 1785, when Monroe had begun the replacement of Jefferson's ordinance, he wrote to Jefferson: "I have never seen a body of men collected in which there was less party, for there is not a shadow of it here"—June 16, Burnett, *Letters*, 8: 144. This suggests that Monroe would not have recognized "party" as involved so long as only one view or interest was expressed. He must have admitted in 1786 (as regarded among other things the resignation of his chairmanship) that the situation was very different. Abraham Baldwin wrote a few months later to Charles Thomson: "The strength and influence in this state [Georgia] is most decidedly of liberal measures to support our national character and policy. In riding through the different states on my return I was fully convinced that the same disposition generally pervades them. There is no place where the clashing of State interest is so

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This characterization assumes what must be shown: that the Ordinance's inconsonance with all the liberal trends of the time was inexcusable. That is the next point to be considered. The excuse has either always been assumed by those who have lauded the instrument or, much more probably, they have not noted the inconsonance; for their laudation of the Ordinance for the compacts it contains has manifestly been based on *their complete consonance* with the idealism of the Revolutionary era.

Since one statute was never actually applied, the difference as respects democracy between the two ordinances of 1784 and 1787 is a very minor historical fact, and quite naturally it has generally been ignored by, or has escaped the notice of, our general historians.²⁰⁰ It is astonishing, however, that the same should be true of biographers of Jefferson, of special students of our political institutions, and even

strongly marked as on the floor of Congress"—Feb. 14, 1786, in *Collections of the New York Historical Society* (1878), 204.

"We have Nine States represented," Rufus King wrote in 1787, "and if I can form an opinion from so short an acquaintance with this new Assembly, I should not lament if their year was nearer its expiration than it is"—Feb. 18 to Elbridge Gerry, Burnett, *Letters*, 8: 541. These last two quotations fairly present the impression one gets, through the years, from Mr. Burnett's collection. Monroe's decidedly does not.

²⁰⁰ See *ante* cccviii. McMaster stated of Jefferson's draft that it was "a code of laws . . . which should serve as a constitution for each state till twenty thousand free inhabitants acquired the right of self-government"; and added to this absurdity the judgment that it was "in no wise a remarkable performance" except for its proposals (lost in debate) on slavery and hereditary titles—J. B. McMaster, *History of the People of the United States* (cop. 1888, pr. 1896), 1: 166-67. In his second volume he got around to the later ordinance and recited its contents—2: 478; but saw in it nothing on which to comment. He overlooked utterly the question of democracy. E. Channing recognized that stronger government was created by the Ordinance of 1787; but in his comments upon Paul Leicester Ford's eulogy of Jefferson's ordinance there is nothing to indicate that he understood that eulogy to be based on the enactment's democratic character. He took it to be based, seemingly, on its slavery proposal and compact proposal (neither adopted); and Channing's own reference to the later law as "the great Ordinance" was seemingly also based on its "compacts" as *ideals*. He had given thought, however, to the legal status of the two enactments and believed them to have none; see *ante* at notecall 1. That being so, he thought the Ordinance of 1787, like the Declaration of Independence, only "a statement of principles, of ideals," not even of legislative character. *History*, 3 (1912): 543, 539 n., 547. Justin Winsor noted that Jefferson's ordinance proposed manhood suffrage, whereas the Ordinance of 1787 established property qualifications, but when he stated the former's "essential features" he gave no emphasis to its provisions for immediate and total self-government—*Westward Movement*, 287, 260. Of Greene's remarks it need only be said that he too seems to have thought only of the supposed compacts, not at all of the question of democracy—E. B. Greene, *Foundations of American Nationality*, 576.

of writers on the two ordinances, particularly if they were (or are) themselves true democrats.²⁰¹

The respective characters of the two enactments being thus overlooked or misconceived, the relation between them has necessarily been subject to similar misconceptions. The number is astonishing of writers who state that the earlier enactment served as a "first draft" of the later, or that this was only an amplification of the other, or that the later ordinance owed much as respected its governmental plan to the earlier law, or who utterly confound one enactment with the other.²⁰² These are matters of fact, the truth as to which is

²⁰¹ Of biographers, if Mr. Schouler noted the difference between the two statutes (he states the self-government provisions of Jefferson's), he says nothing of it.—J. Schouler, *Thomas Jefferson* (1893), 129-32. James Truslow Adams does not refer to it—*The Living Jefferson*, 164-65; see *ante* n. 17? and *post* n. 212. The same is true of the books of George Tucker (1837), H. S. Randall (1858—1: 397-400), F. W. Hirst, W. E. Curtis; C. G. Bowers, *The Young Jefferson*, 341-43; A. J. Nock.

Nothing but superficial facts are to be found in Francis N. Thorpe's *A Constitutional History of the American People, 1776-1850* (2 vol. 1898), 1: 144-49. George Elliott Howard, after lauding with excess the Ordinance of 1787 (see *ante* nn. 180, 189) went on to state its utterly autocratic provisions for government of the first stage without manifesting the slightest consciousness of their true character—*Local Constitutional History*, 408. President Hinsdale wrote that "The imperishable principles of polity woven into the Ordinance of 1787 were the ripe fruit of many centuries of Anglo-Saxon civilization"—*Old Northwest*, 273. This was true of the compact articles of 1787; it was true of the governmental plan of 1784. Jay Amos Barrett (who wrote his thesis on the Ordinance of 1787 under Professor Howard) seemingly saw no substantial difference between the two ordinances.—*Evolution of the Ordinance of 1787*, 37-38, 44-45; yet both he and Howard were true democrats, well known to the writer. Governor Edward Coles was so exclusively interested (like so many later historians) in the antislavery article that he did not even advert to any difference between the two ordinances as respected their governmental provisions—*History of the Ordinance of 1787*, 9-15; on the contrary, after stating the provisions of Jefferson's plan he said, "all which provisions were those which formed substantially the ordinance" of 1787, "to which were added *in more detail* the form of territorial government and" the regulation of descent and conveyance—*ibid.* 14 (*italics added*).

²⁰² Most extraordinary of all is Max Farrand's statement that "as a working plan of government the Ordinance of 1787 owes much to Jefferson's Ordinance of 1784"—*The Fathers of the Constitution*, 75. Professor Channing suggested that "Certainly it"—Jefferson's law—"may at least be regarded as the first draft of the great Ordinance"—*History*, 3: 539. This seems to be the view, also, of Professor Paxson (*ante* n. 189), who thinks that the Ordinance shows merely "elaborations upon his [Jefferson's] idea and . . . practical improvements," though he introduces ambiguity by adding: "so sweeping as to show the touch of other hands and interests"—*American Frontier*, 66. Likewise of Alexander Johnston: "The fairest view is that Jefferson's report was the framework on which the ordinance [of 1787] was built: the general scheme was that of the former, but the provisions

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patent for anyone who reads the two instruments. Since Jefferson's plan was a law, the repeal of which was essential before it could be supplanted by another, it was necessarily a point of departure. But the whole process was one of departure. The later statute took from the earlier literally nothing of spirit, and of matter nothing except six provisions embodied in one of the six compact articles of 1787. But let us add, as taken from Jefferson, the sixth compact article on slavery—though it was not taken from his ordinance, both because it was not there and because very different in content from the provision in his original draft. Still, the actual borrowing, considered physically, would be only an eighth of the Ordinance's verbiage. If one considers the remainder, nearly a third was totally new even in subject matter,²⁰³ and the other two-thirds, though dealing with the common subject of local government, were not in any acceptable sense a revision of Jefferson's plan. Nothing could have been drawn from the latter except the subject; every provision on it was utterly new in matter, and totally antagonistic in spirit, to Jefferson's provisions. Those who have written of the later law as based on his have wished him to share in a glory they attribute to the former, but fortunately for those who revere Jefferson as a great liberal there is no basis for the supposed affiliation.

Even more numerous are generalizations to the effect that the Ordinance of 1787 embodied "in the main" or "substantially" the provisions of Jefferson's, or "the best" or "most essential" of them.²⁰⁴ These generalizations present a question of opinion.

were amplified, and the following changes and new provisions were made"—in J. J. Lalor, *Cyclopaedia of Pol. Sci.* 3 (1904): 31, col. 2, s.v. "Ordinance of 1787." Mr. Bowers either completely confounds the two ordinances or wholly merges their effects in Jefferson's favor. He speaks of him as "writing . . . the Ordinance of the Northwest Territory" (and he did write one), and of having "drafted the Ordinance of the Northwest Territory, which first gave an organized society to the future States" of that region "that was in keeping with republican ideals," which was true only of a society and an organization existent in a paper writing. C. G. Bowers, *The Young Jefferson*, 335, 339, 342, 344; italics added.

²⁰³ Totally new were the introductory portion dealing with decedents' estates, wills, and conveyances; the first, second, and third compact articles; and the navigation clause at the end of the fourth.

²⁰⁴ James Schouler put it that Congress, in organizing the territorial system, "adopted in the main" Jefferson's plan—*History* (N. Y. 1894), 1: 109; (Washington, 1880), 1: 100 n. John T. Morse wrote of his plan: "It contains the substance of the famous Ordinance of the Northwestern Territory"—*Thomas Jefferson* (1918), 75. Professor Muzzey says that "Its provisions were copied largely in the famous Northwest Ordinance of 1787 and

However, it seems to be obvious that since both enactments declared themselves to be "for the government of" the territory northwest of the Ohio, and not of the future states to be formed therefrom, the strictly governmental plan should be regarded as the substantial or essential part of each. That is, the supposed compacts of the later ordinance should be wholly excluded, not only because it is a hundred years since the Supreme Court explained their true nature,²⁰⁵ and historians should ere this have learned it, but because even those "compacts" that obviously referred to the present had reference to personal rights *against* government and not to its forms and mechanism. If the essence of the two ordinances is their governmental plans, any suggestion that substantial or essential provisions of the earlier plan were adopted in the later would be obviously erroneous; for it has been seen that both the letter and the spirit of the two plans were utterly unlike and irreconcilable, and were deliberately made so.

But this refers to the plan of actual government. There were three large aspects of the system under the two ordinances in which they did not differ: (1) that government of the settlers preceding their organization as a state admitted to the Union was subject to some restrictions; (2) that as soon as self-government existed in the Territory its inhabitants were also to have a limited representation in Congress; and (3) that ultimately they were to be admitted to the Union upon attaining a certain population (etc.). These are doubtless the distinctive features of the territorial system. But were they the essential provisions of Jefferson's plan, and were they copied from it into the Ordinance of 1787?²⁰⁶ The allowance or denial of

in the Constitution of the United States"—*Thomas Jefferson* (1918), 109. Mr. Malone writes: "Its essential features were incorporated in the more famous Northwest Ordinance of 1787"—D. Malone, *Jefferson and His Time* (1948), 1: 412. And yet Mr. Malone also states: "The specific provisions for government . . . were superseded by the provisions of the Ordinance of 1787. They were chiefly significant in allowing for successive stages of government, and for self-government at every stage"—*ibid.* 413.

²⁰⁵ See *ante* ccxvi seq.

²⁰⁶ This would seem to be, essentially, Dumas Malone's view—*ante* n. 204. Dr. Burnett's view might be classed with those of the authors quoted in n. 204 or (perhaps) here; for he first states succinctly *all* of Jefferson's plan ending with a reference to limited representation in Congress and admission to the Union upon attaining a certain population, and then concludes: "*These* features, in their essential character, remained the core of the system finally adopted in 1787"—*The Continental Congress*, 600; italics added.

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personal credit to Jefferson is here in issue. It might possibly be given properly as respects the second principle; however, Jefferson himself presumably took that from Silas Deane or Thomas Paine. Credit could be given Jefferson for the third principle only on the assumption, probably justified, that he first proposed it. It was a provision of the compact between Virginia and the Confederation, necessarily taken thence both by him for embodiment in his ordinance and by those who framed the later statute. Finally, should Jefferson be credited for any "copying" in 1787 of provisions for the government of territorial inhabitants preceding admission to the Union? The compact with Virginia required no pre-admission government; much less, government of a particular kind; the type suggested by Jefferson was therefore truly his. But it would be both a logical absurdity and an injustice to Jefferson to say that the essentially restrictive government of the Ordinance of 1787 arose from copying a plan in which restrictions on self-government were virtually non-existent. The mere idea of some pre-admission government could have been copied; but surely the framers of the later ordinance needed no suggestions respecting such government, nor did they concede that Jefferson had provided any. In truth, all they did proceeded from their own conservative heads.

Could it still be true, however, that "the best" of Jefferson's provisions were transferred to the later ordinance?²⁰⁷ Certainly not if the best were those which conferred immediate and complete self-government. Also, probably many would concede these to have been best, provided the disorder of the frontier and the doubts many harbored of its loyalty gave no reasonable justification for repudiating them; and reasons will be given below for the opinion that they did give no justification. However, it would seem that historians today, perhaps no less than a century ago, can see little in the Ordinance of 1787 save its compacts,²⁰⁸ and some of these might to them

²⁰⁷ "The fifth and great Ordinance, as Mr. Bancroft says, embodied the best parts of all its predecessors"—B. A. Hinsdale, *Old Northwest*, 273. The five "ordinances" presumably meant are Jefferson's, Monroe's two committee reports, Dr. Johnson's one, and Dane's third. Mr. Hulbert has given the great weight of his name to the same judgment: "The Ordinance of 1787 . . . was a summing up of the best of contemporary opinion"—A. B. Hulbert, *The Records of the Original Proceedings of the Ohio Company* (1917), 1: xciv.

²⁰⁸ If Professor Channing be not the only one who has given serious thought to their nature, at all events he is the only one whose writings I have

seem "the best." If we so assume, and also assume, first, that the best provisions were those declaring personal liberties—though, recurring again to John Dickinson,²⁰⁹ a superlative seems here to be logically indefensible,—one difficulty is that none of these came from Jefferson's ordinance. Another is that, after all, Congress merely promised in those provisions that it would observe (and it faithfully did) those principles which in every state the constitution compelled the legislature to observe. Those who eulogize the compacts are eulogizing merely a legislative tribute to Anglo-American traditions. If one next chooses the slavery compact, the difficulty again is that, speaking accurately, it was not taken either from his ordinance or from his original draft.²¹⁰ Still, in a general way the good idea might be said to have come through him. And, likewise, if one were to choose the six provisions formulated by Jefferson to indicate the legal separateness of territories and Union, all those (though two were hardly his) were taken over into the later ordinance.²¹¹

In this manner it is possible to accept with qualifications some of the loose generalizations that have been uttered respecting the relation between the two ordinances.²¹²

IV

Direct and contemporary testimony that abandonment of Jefferson's provisions for liberal territorial self-government was a special objective of eastern conservatives is given us by Dane. Much, said he, as respected desirable developments in the West, would "depend on the direction given to the first settlements . . . and as the Eastern

happened to read and in which I have noted any reflection of such thought. And that his thought was not sufficient to be satisfactory is clear from nn. 1, 200, 202 *ante*.

²⁰⁹ *Ante* n. 18.

²¹⁰ *Ante* cccxxi-ii.

²¹¹ Mr. Malone characterizes these as "the most striking feature" of the plan—D. Malone, *Jefferson and His Time* (1948), 1: 413. See *post* cccclxxxii-iii.

²¹² Particularly when what is said to have been transferred is identified as "famous." Thus it is measurably true that "the later ordinance, in its more famous clauses, was all drawn from Jefferson's"—James Truslow Adams, *The Living Jefferson*, 164; although—since the six provisions of Compact IV, taken from Jefferson, are no more famous than those of I and II which were not so taken—a "some of" might well be inserted. Probably Mr. Adams was thinking of the slavery compact as taken from Jefferson's ordinance. So was Paul Leicester Ford when he stated that that enactment "contains practically every provision which has made the later ordinance famous"—*Writings of Thomas Jefferson*, 3: 430.

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states for the sake of doing away the temporary governments, etc. established in 1784, and for establishing some order in that Country, gave up as much as could reasonably be expected,²¹³ I think it will be just and proper in them to establish as far as they can consistently, Eastern politics in it, especially in the state adjoining Pennsylvania.''²¹⁴ In a deliberate and somewhat apologetic attempt to justify the illiberality of the Ordinance, Dane also gave direct testimony—forty-three years after its enactment—that the action of Congress in adopting that statute's illiberal governmental provisions was dictated by fear. Said he:

The objection, that it did not sufficiently favour freedom as to a territorial system . . . will vanish when we properly consider the peculiar state of our country in July 1787; then the Federal Constitution had not been formed; then there were strong apprehensions that the territories, or some of them, might not be disposed to come into the Union as States, if they should have territorial governments that should make their condition as territories, as much to their wishes or more so, as it probably would be when States in the Union. Hence it was deemed best by all but one member,²¹⁵ so to form their territorial system as to create some real motives in them to draw and bring them into the Union in due time.²¹⁶

It is noticeable that Dane here makes no reference whatever, as a reason for adopting a centralized territorial government, to any supposed danger that the West might otherwise have been lost to a foreign power. Had that entered into the reasons of the committee, or Congress, it would seem that he would not have forgotten it or omitted it even thirty-six years later. He defends the system adopted for but one reason: that the inhabitants of the Territory would not be contented under it, and being discontented would be desirous of entering the Union to escape it. *This was in fact its operation and*

²¹³ What concessions were made, of any tangible nature and substantial value, does not appear. See the report to the governor of Massachusetts by the delegates of that state after passage of the Ordinance, quoted *ante* n. 47. Since there is no reference in their report to anything else that could possibly have been a concession of importance, and the above statement does seem to be apologetic, possibly Dane regarded this as the sacrifice made by Massachusetts. If so there seems to be no other evidence that it was regarded as such. It has been said that the Ordinance forced a lowering of the price of state backlands; but evidently they were not lowered to the lowest remunerative price—compare W. P. Cutler, *Manasseh Cutler*, 1: 303-4.

²¹⁴ Letter of Aug. 12, 1787—Burnett, *Letters*, 8: 636.

²¹⁵ Abraham Yates of New York.

²¹⁶ N. Dane, *Abridgment*, 7: 444.

consequence throughout the existence of the territorial system.²¹⁷ However, this explanation of the committee's action—if there be any truth in it—is very far from being all the truth.

It fitted the facts respecting the operation of the Ordinance as time had made them clear after the admission of six states to the Union under its provisions. Nor was it inconsistent with anything that Dane had written earlier than 1787; that record merely shows that he desired a very strong government—stronger even than that which the Ordinance provided; *not the reasons why* he desired such.²¹⁸ The explanation is, however, wholly inconsistent with the passage above quoted from a letter written a month after adoption of the Ordinance. Nor does it fit at all the record of the instrument's drafting, in which Dane had participated for two years. It did not cover Richard Henry Lee's reason for desiring the new plan,²¹⁹ nor explain Dane's great pride in claiming authorship of the clause forbidding impairment of contracts, a claim which he contested with Lee.²²⁰ In short it may be a partial but is certainly a specious explanation. It is inconsistent with the declarations of the Duane committee in its report of October 1783,²²¹ with those of the grand committee of March 1786,²²² with those of Monroe's first report of May 1786.²²³ It is perfectly clear that in men's first thoughts of the territories—of Congress in its declaration of October 1780, of the army officers in their plan of 1783, of Washington in his comments thereon and in other

²¹⁷ It is quite evident that the discontent admittedly intended to be thus created would have increased any danger actually existing in local desires for independence; yet no special provisions for military control were made in the Ordinance, or debated in Congress at the time in connection with the Ordinance. It seems, therefore,—assuming the reliability of Dane's explanation for the adoption of a repressive government—that the committee must have taken a dim view of the likelihood of any danger of a movement for independence on the border.

²¹⁸ In fact there is no record written by Dane that antedates the Ordinance; the letters quoted *ante* at notecalls 132 and 214 were both written after the Ordinance was passed. Dane was elected a delegate in 1785, 1786, and 1787, to sit each time for one year beginning in November. Mr. Burnett prints in his *Letters* twenty-three letters of Dane, of which three contain references to separatism in Maine and Vermont and (*post* at notecall 301) to the western settlements of the Atlantic states; and two, those cited above in this note, referred to the Northwest Territory.

²¹⁹ *Ante* at notecall 130.

²²⁰ *Post* n. 363.

²²¹ Quoted *ante* following notecall 97.

²²² Quoted *ante* preceding notecall 112.

²²³ Quoted *ante* preceding notecall 114.

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letters, of Jefferson in his governmental plan of 1784—there was none for the provision of a period of probationary or tutelary government.²²⁴ It may perhaps be assumed, though it is nowhere so stated or even hinted, that there was an idea of requiring a certain population, but that is a different matter. And more plans than those heretofore cited reflect these same ideas.²²⁵

The report of Duane's committee in October 1783 undoubtedly was a reaction against manifestations in the debates of the preceding summer of an inclination to neglect adequate control of the "disorderly and dispersed settlements" on the border and "the depravity of manners which they [had] a tendency to produce." The conservatives made their attack more effective by seeking and securing Washington's advice (in substance a repetition of well-known views) against indiscriminate locations as a *mode of settlement*, and coupling this with an expression of their own views respecting the *form of government*.²²⁶ Jefferson's plan, adopted in the following April did not

²²⁴ *Ante* lxxii-iii, clix-lx, cclxxxii-iv, cclxxxvi-ix.

²²⁵ In the motion by Theodorick Bland in Congress, made on June 5, 1783 and designed to give free land to the army in lieu of all debts due its officers and private soldiers, a population of 20,000 "male inhabitants" was the condition of admission—*Jour. Cong. Cong.* 24: 385. Mr. J. A. Barrett, in *Evolution of the Ordinance of 1787*, at 4 n. 1, refers to Silas Deane's letter of Dec. 1, 1776 to the Secret Committee of Congress. This letter suggested the sale of lands in the Northwest to pay the war debt; advocated a grant to a company "of Europeans and Americans" ("which company should form a distinct State") of land for colonization, it to "engage to have in seven years . . . [blank] thousand families settled on said grant, and civil government regulated and supported on the most free and liberal principles, taking therein the advice of . . . Congress"—*American Archives, Fifth Series*, 3: 102. It was not explicitly stated that the inhabitants should be admitted as a state of the Confederation, but that was probably assumed. Thomas Paine, in a pamphlet of 1780, assumed that a state unpeopled when created would require national government "for a certain term of years (perhaps ten) or until the state becomes peopled to a certain number of inhabitants." He also answered negatively the question "whether a new state should immediately possess an equal right with the present ones in all cases which may come before Congress," but thought "it ought to be immediately incorporated into the Union on the ground of a family right"—as "a younger child of the same stock." "But," said he, "as new emigrants will have something to learn when they first come to America, and a new state requiring aid rather than capable of giving it," it should at once have some representation—"Public Good," in *Works* (Van der Weyde ed.), 4: 107-8. See *post* cclxxix. Mr. Hulbert has published various of these sources in a reprint which, as he says, facilitates the use of the books of Mr. Barrett and of Professor Treat (*post* n. 239)—A. B. Hulbert, *Ohio in the Time of the Confederation*. Some of his editorial comments are elsewhere quoted.

²²⁶ Compare Washington's letter of Sept. 7, 1783—*Writings* (Fitzpatrick ed.), 27: 133—with the report quoted *ante* at notecall 98.

conform, in the opinion of conservatives, to the views of Duane's committee. This was why it was repealed, as shown in the report of the grand committee two years later, followed by the first report of Monroe's committee, when the actual repudiation of the plan was begun.²²⁷ It seems to be quite clear that there only gradually developed the view that was embodied in the Ordinance of 1787. And the change in men's attitudes within a few years is shown by the fact that the new plan was applied to a settlement of which the core was constituted by the identical army officers and soldiers who expected in 1783 to be admitted immediately to the Union under a constitution and laws adopted in company meeting in advance of migration, with Washington's wholehearted approval.²²⁸

Although it is perfectly clear *what* was done, it remains to consider somewhat further *why* men who prized self-government in their own states should have resolved to treat their western fellow citizens as wards; or, to use words more suggestive of their motives and less of

²²⁷ The former emphasizing the need of a government such that "order and the true principles of government may be established"—*ante* at notecall 112; the latter serving notice that the government must last until the border individualists should become nationally minded—*ante* at notecall 114. It has been indicated at notecalls 155-58 above that probably Nathan Dane and other conservatives would have desired to have the Northwest ruled by commissioners or magistrates of latitudinarian powers. Since the Ordinance draft had from the beginning excluded representative government, and no *legislative* provision appeared until May 1787, the introduction of the power to "adopt" laws of the "original states" (*post ccccv seq.*) very probably appeared a step of liberalism.

It would perhaps be of no utility to compile a long list of the illiberal sentiments expressed by early administrators in the territories. Some may very well have been justified by circumstances of the moment, such as the fears of an Indian uprising when Secretary Gibson voiced the opinion that only the military could enforce obedience and that none who refused obedience should be allowed to remain in the Territory—*post ccclx*. The following expressions of opinion respecting the character of territorial inhabitants and the government most proper for them are but a sample from the three oldest territories: by Governor St. Clair—Carter, *Territorial Papers*, 2: 208-9, 458; by Secretary Sargent—*ibid.* 433, 578, 587, 622; by Andrew Ellicott—*ibid.* 5: 3-4, 131-32; by Secretary of State Timothy Pickering—*ibid.* 5: 27, 31, 34; by Judge David Campbell—*ibid.* 4: 101; by Judge Harry Toulmin—*ibid.* 6: 270. But with such views it is salutary to compare expressions of opposition, more or less "popular"; see the Cato West memorial to Congress on behalf of a "committee" (Governor Sargent alleged, the minority of a committee) of inhabitants—*ibid.* 5: 81; and the reply to Sargent and the judges—*ibid.* 88.

²²⁸ Letter of June 17, 1783—*Writings* (Fitzpatrick ed.), 27: 16. He lauded the class of settlers, emphasized the great advantages of the general plan, *said* nothing on the point of statehood, submitted "the justice and policy of the measure to the wisdom of Congress."

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their attempted justification, as minors and incompetents. What did Dane, for example, have in mind when he referred in 1824 to "the peculiar state of our country in 1787" and "apprehension that the territories, or some of them might not be disposed to come into the Union as States"? Presumably he was thinking of the Southwest, where frontiersmen were exercising the self-government which Jefferson's ordinance had approved. So far as he referred to the character of frontier society, his attitude and the purpose of the Ordinance are plain; and it only remains to consider below whether the fears entertained were reasonable, and the action taken therefore excusable. Another matter should, however, first be here disposed of: To what extent did apprehensions respecting British occupation of the Northwest posts and Spain's command of the Mississippi enter into the fears that dictated adoption of the Ordinance?

It is impossible to disunite, in the records of the time, fears of indigenous separatism and fears of the force or blandishments of foreign powers. Nevertheless, as factors in our western policy they must be separately appraised, and the latter is by far the simpler. The only fear was that the "loyalty" of the frontier might be barterable for favors from the powers across the line;²²⁹ and this presupposes the prior existence of serious discontent in our western

²²⁹ Thus, King wrote to E. Gerry: "I . . . am every day more confirmed in the opinion that no paper engagements, or stipulations, can be formed which will insure a desirable connection between the Atlantic States and those which will be erected to the Northwestward of the Apalachian or Alleghany Mountains, *provided the Mississippi is immediately opened.* . . . I know not what advantages the Inhabitants of the Western Territory would acquire by becoming members of the Confederacy. They will want no protection; their location would sufficiently secure them from all foreign hostility; the exchange of Merchandize, or commerce, would not be across the Apalachian Mountains, but wholly confined to the Mississippi." *If, however, they could be "cut off for a time from any connections, except with the old States,* across the mountains, I should not despair that a Government might be instituted so connecting them with the Atlantic States, as would be highly beneficial to them both & promise a considerable trade"—letter of June 4, 1786 in C. R. King, *Rufus King*, 1: 175-78; same, with formal variations, in Burnett, *Letters*, 8: 380-82; italics added. The attitude manifested by Monroe in a letter to Jefferson was not very different: "On the part of . . . the states upon the Atlantick it is in my opinion their policy to keep a prevailing influence upon the Ohio or to the westward. What unites us to them or rather they to us when the Mississippi shall be open? Removed at a distance from whatever may affect us beyond the water, they will necessarily be but little interested in whatever respects us; besides, they will outnumber us in Congress unless we confine their number as much as possi-

settlements, since if they were contented, fears would obviously have been for Spain and Great Britain rather than ourselves. The problem of foreign relations merely envelopes the more fundamental domestic problem of the frontier.

To remove the envelope does not seem difficult. Of course there was some western talk of independence. But what sound evidence is there that frontiersmen who wished to be rid of distant government from the Atlantic ever seriously dreamed that they would be better off if ruled from Spain or London?—or even from New Orleans or Canada? It is difficult to believe that such questions have ever merited serious consideration. Much of the talk that was reported from the West was mere counterfeit. The most interesting was the whispered wake left by a few adventurers. Intriguers, and small officials anxious to rise, sometimes used it to advance personal ends; petty county politicians in Kaskaskia still had resort to this practice years later when they admonished Congress to remember the state of European affairs, and confessed “a shudder at the horrors which may arise from *a disaffection in the West*” (themselves italicizing the last horrendous words).²³⁰ This was nineteen years after the passing of the Ordinance; but it is ridiculous only because it was so belated a resort to a device unquestionably often earlier used. Of talk which was not mere counterfeit the overwhelmingly major portion in the 1780’s—and in the late 1790’s when fears of French influence in the Illinois Country and of British partisanship in Detroit were rife—was indubitably of a thoroughly insubstantial nature. There were the nameless “man of character” here and “gentleman” there whose reports were forwarded; the “leading characters” supposedly impatient to rise; the inhabitants who were seemingly good and inoffensive, and mayhap officials, but who had never been naturalized; the “party” that called themselves Sans Culottes and would acknowledge no other laws than French; the local judges who discovered neighbors to be “criminals”; the zealous officials who timorously reported that only firmness could command silence and obedience; and there were the citizens known at the seat of government who reported all this

ble. In my opinion this matter should be well investigated before any measure is hastily adopted”—letter of Aug. 25, 1785, in Burnett, *Letters*. 8: 203.

²³⁰ Philbrick, *Laws of Indiana Territory* (I. H. C. 21), xlvii n. 1; compare xxv n. 1.

when consulted and the other good friends of government who voluntarily reported it. But when all had made their contributions what was there? The sum and substance of it all was an accumulation of idle rumor and petty gossip, of hysteria spread by crackpots, of stories blown by little people anxious to attract notice. The fate of adventurers and speculators like Wilkinson and Morgan is sufficient evidence of the absence of popular support in their foreign associations.²³¹

Of course the government of Spain was willing to give some encouragement to sentiment for western independence. Of course, too, conspirators like Wilkinson were willing to encourage (or to *seem* willing to encourage) subjection to a foreign power.²³² But in any actual bargain with either Spain or Great Britain,²³³ commitments would have been necessary, at least in favor of the one and

²³¹ The question whether Franklin and others would have preferred to have the Northwest *remain* British by the treaty of peace is a totally different matter. In Mr. T. P. Abernethy's *Western Lands and the American Revolution* (1937), ch. 21, and in P. C. Phillips, *The West in the Diplomacy of the American Revolution* (1913—University of Illinois *Studies in the Social Sciences*, 2) there are abundant references on that subject.

Emigration across the Mississippi into Spanish Territory had been going on ever since 1763—See C. W. Alvord and C. E. Carter, *The New Regime, 1765-1767* (I.H.C. 11), xxi—but particularly since 1787, with more or less encouragement by the Spanish authorities—cf. Philbrick, *Laws of Indiana Territory* (I.H.C. 21), xxiii, lxxv, ccxvii; C. W. Alvord, *Cahokia Records, 1778-1790* (I.H.C. 2), lxxxiii, cxli-cxliii, and *Kaskaskia Records, 1778-1790* (I.H.C. 5), index *s.v.* "Emigration of French." But these emigrants were in very large part indeed the French settlers of the Illinois Country. Immigration of Americans was not permitted. To be sure, George Morgan's concession at New Madrid in Arkansas was to be settled with Americans, to whom various economic privileges were promised. However, he took only seventy persons (1789) from Pennsylvania, and they soon returned home when he abandoned the project—M. Savelle, *George Morgan: Colony Builder* (1932), 206, 209, 227. A few other persons from the French settlements in Illinois went to New Madrid after Morgan had left.

²³² W. R. Shepherd, "Wilkinson and the Beginning of the Spanish Conspiracy" (1904), in *American Historical Review*, 9: 490. The fact that Dr. Cutler made use, in his arguments with members of Congress, of the danger from Spain and Britain—W. P. Cutler, *Manasseh Cutler*, 1: 303-5—is *perhaps* good evidence of the strength of these fears; but also perhaps merely of his shrewdness in using all levers to move different men.

²³³ John Connolly's efforts to interest Kentuckians in an attack on New Orleans was seemingly of very scant importance. See M. Savelle, *George Morgan*, 210, 225. As respects the policy of the Spanish government itself one is forced to distinguish Floridablanca's vague alternatives (I have not seen the Spanish) of (a) "alliance," (b) "placing themselves"—the Kentuckians—"under the protection of the King," and (c) "union . . . under pacts which assure their liberty"—S. F. Bemis, *Pinckney's Treaty . . . 1783-1800* (1926), 146.

probably also against the other, and there seems to be *no reason whatever* to believe that the western settlers would have bargained. Though Monroe in his gloomiest moments in 1786 imputed to the Jay party a willingness to drive the West to independence he certainly was not charging them with the desire, or attributing to the West a willingness, to have it subject to Spain. And though Wilkinson assured Spain's representatives at New Orleans that he was "persuaded" the people of Kentucky would apply for protection by Spain "as her subjects," in his later-written *Memoirs* he sought to vindicate himself against even the charge "of alienating Kentucky from the United States, while a prospect of national protection remained," by pronouncing that to be "as absurd, as the idea of reducing them to the vassalage of Spain"; and he then went on to describe "such a proposition" (meaning possibly only the latter, perhaps both) as "ludicrous," "vain and chimerical," and "a monstrous extravagance."²³⁴ No doubt they were. As noted above, some persons did join George Morgan's colony in Arkansas, though they did not happen to be westerners;²³⁵ *they*, with possibly a few exceptions of Catholics, would certainly have gone to no country with any other intent than that of being masters in it. Jefferson's delight over the prospect of Morgan's success in attracting thousands was logical.²³⁶

Clearly, then, as already said, there was no *independent* problem of separation springing from the presence of foreign powers beyond the frontier; nor does there seem to be evidence that their presence added appreciably to the problem of indigenous separatism, such as it actually was. It may therefore be said that so far as the reasons upon which Congress based its abandonment of Jefferson's ordinance *may* have included fears based upon assumptions contrary to the propositions stated, they were based upon illusions. Of course, the information available to Congress was scanty.

The real significance of the western problem lies in the fact that the West's "loyalty" was distrusted without regard to the corrupting influence of these foreign neighbors. This problem of indigenous separatism was a real problem, because more or less definite sentiment

²³⁴ Compare Shepherd, *ante* n. 232, at 501.

²³⁵ *Ante* n. 231. Wilkinson defeated Morgan by intrigues at New Orleans—Saville, *George Morgan*, 215-25.

²³⁶ He wished 100,000 would accept: "It will be the means of delivering to us peacefully what might otherwise cost us a war"—*Writings* (Ford ed.), 5: 316.

for independence did exist. It was also very complex; and it was not one of, or located on, the frontier. It existed to at least an equal—indeed, properly speaking, to a much greater—extent in the Atlantic states; for it was concerned essentially with states of mind, and these were simple on the frontier and complicated in the old states. The one definite reality was the desire of the frontiersman to be free of remote or unequal government. On the other hand the attitude of those he had left behind was a tangle of social prejudices and political prepossessions respecting border society, most of which were substantially unjustified.

There were various and obvious reasons why border settlers in every state were disliked by their fellow citizens who did not wander; and both the dislike and the distrust that is akin to it are spread through the literature on the frontier. Some of the reasons for such dislike and distrust, as respectable as any of them, are perfectly illustrated by remarks which James Kent recorded in his diary when on circuit in 1800 in western New York. "Jurors and people," he wrote, "looked rude in their manners and dress and gave me an unfavorable opinion of the morals of the country." To this confusion of appearances with morals he added one of reasoned with purely emotional dislikes in a reference to "squatters, insolvent emigrants, and demagogues."²³⁷ Creditors did have, of course, substantial cause to distrust emigrant debtors, and their attitude was spread widely among the propertied class, as Judge Kent's remark illustrates—though he should have known well the other side of the picture.²³⁸ Space cannot be devoted to mere social prejudices; nevertheless their influence was powerful, and more pervasive than any reasoned arguments for repressive government of the frontier.

There were various other problems that entered into the determination of eastern public opinion concerning the frontier, and except as regards fugitive debtors the factual basis for judgments upon them was both scant and indefinite. It is also true of all these problems, with the same exception, that they could not directly or necessarily have influenced the choice of a particular type of government for the

²³⁷ J. T. Horton, *James Kent* (1939), 126 n. 9, 127. See *post* at notecall 257. "The people in the Atlantic States have not yet recovered from the horror, inspired by the term backwoodsman. This prejudice is particularly strong in New England, and is more or less felt from Maine to Georgia"—T. Flint, *Recollections of the Last Ten Years* (1826; ed. 1932), 170.

²³⁸ See *post* n. 257.

western settlements, for both northeasterners and southeasterners, regardless of variant opinions respecting them, wanted a *strong* territorial government. But they did undoubtedly enter into, and did give a peculiarly speculative basis for, the judgments which easterners formed respecting the frontier. Opinions respecting the drainage of manpower from Atlantic states, and depreciation of their backlands, that might result from opening the Northwest were necessarily speculative.²³⁹ The fears entertained by northeastern commercial classes that a trading outlet down the Mississippi might divert from them a trade across the Alleghenies were visionary.²⁴⁰ The problem of admitting new states was the greatest single obstacle in organizing the federal territory and the new national government. Much more strongly than the last preceding problem it had suggested the desirability of controlling the amount and direction of migration across the Ohio. It sharply divided northern and southern statesmen, each judging it by the supposed effect of admitting any state upon the influence of his own state in federal councils.²⁴¹ It gave more concern to

²³⁹ Though they could judge in a general way by the history of their own western borders. These fears had not prevented acceptance of Virginia's cession, adoption of the land ordinance, nor unanimous approval of the Ordinance of 1787. There was, however, some drainage of population, and the state lands were long available at lower prices—Cutler, *Manasseh Cutler*, 1: 303 n. and P. J. Treat, *The National Land System, 1785-1820* (1910), 88. But was there a loss of *needed* manpower or a long-term loss in money or sound development?

Monroe believed that one motive of Jay's supporters was "to throw the weight of population eastward and keep it there, to appreciate the vacant lands of New York and Massachusetts"—letter of Aug. 13, 1786 to Governor Henry—Burnett, *Letters*, 8: 425. Mr. Bemis thinks it indisputable that this consideration determined the vote on the Mississippi question of many eastern delegates in Congress—*The American Secretaries of State* (1927), 1: 245. See *ante* n. 47 and compare cclxxv-vi.

²⁴⁰ Many years later, when there were still no railroads but other roads were greatly improved, Thomas Hart Benton remarked that the idea of sending the products of the West across the Alleghenies was "the conception of insanity itself"—Feb. 2, 1830—*Register of Debates in Congress*, 6: pt. 1, pp. 115-16.

Rufus King argued the commerce problem at length in a letter of Aug. 13, 1786 to E. Gerry—Burnett, *Letters*, 8: 425. He also noted the economic loss involved in migration. Referring to the "almost incredible accessions of strength" made by the western settlements, he added: "The States situated on the Atlantic are not sufficiently populous, and loosing our men, is loosing our greatest Source of Wealth"—letter of Sept. 3, 1786 to Jonathan Jackson, *ibid.*, 8: 458.

²⁴¹ On Vermont compare Madison, letters of Sept. 19, 1780 and Jan. 22, 1782—*Writings* (Hunt ed.), 1: 70, 175; Washington, letter of Feb. 11, 1783—*Writings* (Fitzpatrick ed.), 26: 121; Jefferson's letter of July 12, 1785—*Writings* (Ford ed.), 4: 71; (Federal ed.), 4: 436. There is a brief review of the

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statesmen, and notably to Jefferson, than distinctions between liberal and illiberal government of territorial inhabitants.²⁴² But no judgments could have had a more uncertain basis than those incidental to any solution of this new-state problem.²⁴³

No doubt it was the manifest importance of these questions, coupled with the lack of factual basis for opinions regarding them, that caused them to be so stubbornly contested.

Let us now return to the question whether the fears that actuated Congress in adopting the Ordinance's plan of government were reasonable. And the first observation to be made is: that since only three years had passed since the territory had been ceded by Virginia, and proclamation had been thereafter made that it should "for ever remain a part" of the Confederation, it is undesirable to approach the question with any such concepts as "loyalty," "disunion," "secession," or "separatism" in mind. Those words are colored by a century and more of national union. Unity with the East had been proclaimed, but loyalty either to it or to the individual states left behind by emigrants could hardly, in justice, be expected. Loyalty to the Confed-

whole matter in A. C. Flick, ed., *History of the State of New York* (1933-1937), 3: 307-24, 5: 3-28.

On Maine see E. Stanwood in Mass. Hist. Soc. *Proceedings*, 1907-1908: at 124 *seq.*

On Kentucky compare Monroe's letter of Aug. 25, 1785—*Writings* (Hamilton ed.), 1: 107-8.

On the Northwest Territory compare Monroe's letters of Oct. 19, 1783 in J. A. James, *George Rogers Clark Papers, 1781-1784* (I.H.C. 19), 250, also of Jan. 19, and July 16, 1786 on his own policy and the policy of his north-eastern opponents—*Writings* (Hamilton ed.), 1: 117-18 and 140-42; St. Clair on policy of eastern states—*St. Clair Papers*, 2: 103; Washington's alternative boundary suggestions on a new state, Sept. 7, 1783—*Writings* (Fitzpatrick ed.), 26: 138, and letter of Nov. 3, 1784—*ibid.* 486; Nathan Dane's letter of July 16, 1787—C. R. King, *Rufus King*, 1: 289.

²⁴² *Ante cccv seq.*

²⁴³ We have seen how stubbornly choice was contested between different population formulas, although only guesses were possible (*ante cclxxiv-vi*): upon what metempiric arguments Jefferson rested his preference for small states, considering the character of the border settlers whom he knew, he believed, so well (*ante n. 68*); with what absurd disregard of natural boundaries Congress had originally set its rectangular boundaries of small new states (*ante* at notecall 56); and upon what egregiously erroneous judgments of western soil Monroe rested his arguments for a few and larger states (*ante n. 65* and text). As for judging what will be in the future best for a given state or territory, that is of course an everyday matter for the statesmen of any age, but the basis for judgment is very different today from what it was in 1787. And as regards the balance of power in the Confederation, it would seem proper to describe it as consisting merely in an absence of war.

eration could not enter into the question of mere governmental independence so long as there was no instigation by, or collusion or alliance with, or contemplated allegiance to, a foreign power. And the other words (often implied, if not explicitly used in discussions of western attitudes) are nearly equally misleading. The true question was simply whether danger was presented by a supposed disinclination of western settlements to accept distant rule from across the mountains. There was, to be sure, true separatism in Vermont and Kentucky; but as for any suggestion that their situation might have justified what was done in the Northwest Territory, it should suffice to remember that the treatment accorded them was the *antithesis* of that given to the federal territory. They were admitted to the Union without any prior tutelary government whatever.

We know the later development of the Northwest Territory; the absence in its history of any disposition to resist even in the slightest degree federal control—and of course, even more strikingly, an absence of desire to assert independence. But when the Ordinance was adopted there were no settlers in the Territory save unlawful intruders on the public lands. The Ordinance's drafters, in reading the future, must have based their judgments of what government was desirable either upon a necessarily limited acquaintance (unless in rare cases) with border settlers, of their own states or of the Northwest, or upon hearsay. As a matter of fact there was no essential difference between the problems of the Ohio border and those of the backlands of the Atlantic states; and the differences between both borders and the more settled communities eastward could easily be exaggerated.

There have existed in later times, and probably existed from colonial times onward, misapprehensions regarding border communities which were the basis of strong social prejudices against them. One of these was a belief that the extreme East and the two western borders were very different and that the difference resulted from successive and selective concentrations on the two borders of social undesirables, who left behind them communities of a completely orderly and conservative life. This is a delusion. Millions of Americans now living know that in its late stages all sorts and conditions of men moved to the frontier, and all classes were represented in its society, though probably in proportion to the isolation of the frontier,

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and so to an increasing degree as one goes backward in time, the classes themselves disappeared. There is no reason to believe that the situation was ever essentially different.²⁴⁴ The concentration of undesirables on the frontier was surely vastly less than many imagine, and the extreme East was orderly only to a degree that is not to be exaggerated. A European official in Philadelphia in 1784 wrote of that city that "the great number of emigrants from Europe has filled this place with worthless persons to such a degree that scarcely a day passes without theft, robbery or even assassination."²⁴⁵

Each section's reputation, evidently, depended on the standards or prejudices of its critics. Chiefly upon their prejudices, for one rarely encounters a comment that impresses one as a measured judgment. And three prepossessions respecting the frontier have prevailed very generally: that its inhabitants were shiftless (without even such a qualification as "typically"); that antilegal conduct was rampant in its society; and that the unbridled individualism therein prevalent—which explained much of what unlawful conduct there was—was necessarily associated in politics with disaffection to the Union.

This last seems to have been nothing better than exaggeration of one thing that was properly disliked and an illogical association of it with another thing that was feared. Words of mere dislike or distrust or social disapprobation of border societies might be underlain by any or all of the preceding special assumptions, or might involve none that were recognized as separable. No doubt all three prepossessions dominated Richard Henry Lee. When he referred to "the rude people" who would probably be "the first settlers there" (he knew, of course, pretty well whom the Ohio Company would send out), and to "the uninformed, and perhaps licentious people as the greatest part of those who go there are," and to "the Sons of Violence" who seemed about to wrest from Congress the treasure of the federal

²⁴⁴ A little illustrative material is gathered together in J. R. Commons *et al.*, *A Documentary History of American Industrial Society*, 2 (1910): ch. 14-20; A. B. Hart, *American History Told by Contemporaries*, 3 (1902): 97-119. The education and great ability of leaders on the first, and in some ways perhaps the rudest, frontier can be judged by reading the petitions and other documents in S. C. Williams, *History of the Lost State of Franklin* (rev. ed. 1933), 115, 226, 348, 356; and note the debates in same, ch. 21.

²⁴⁵ See the report in 1784 from Philadelphia of Thieriot, Saxon Commissioner of Commerce to the colonies, quoted by Prof. Lingelbach, and through him by M. Farrand, *The Fathers of the Constitution*, 3.

lands,²⁴⁶ one feels that these are no pondered judgments, but merely epithets expressive of class prejudice. When Nathan Dane took comfort in the arrival at Congress of Richard Henry Lee, whose "character," he wrote, "serves to check the feeble habits and lax mode of thinking of some of his countrymen" (that is, presumably Carrington, chairman of their committee giving final form to the Ordinance of 1787), the community of prejudice is plain.²⁴⁷ Such an attitude contrasted strongly with the fairer attitude of Washington and Monroe,²⁴⁸ though the latter had gone most of the way with Dane in shaping the Ordinance's illiberal governmental scheme.

A few words may be given to the very common charge that shift-

²⁴⁶ July 30, 1787 to William Lee, July 15 to Washington, July 14 to Francis Lightfoot Lee—Burnett, *Letters*, 8: 629, 620. In the last he wrote, "we have now something to sell that will pay the debt and discharge the greatest part of the Taxes, and altho this something is in a fair way of being soon wrested from us by the Sons of Violence, yet we have a thousand little difficulties that prevent us from selling!" Seemingly, the Sons of Violence were the territorial squatters.

²⁴⁷ And further evidenced by their friendly rivalry in claiming authorship of the clause against impairment of contracts—*post* n. 363. Eminently desirable as that was, the unjust treatment of debtors at the time reveals the social prejudices supporting a sound principle. Dane, Lee, and Melancton Smith dominated the committee; as Dane wrote, "We . . . at last agreed on some principles—at least Lee, Smith and myself"—Dane to R. King, July 16, 1787, Burnett, *Letters*, 8: 621. Did his reference to "M—s p. system of W. government" mean "Monroe's puerile (or pusillanimous) system of western government"? It seems quite possible.

"Patrick Henry and Richard Henry Lee . . . were now [after peace] opposing the Revolutionary development as warmly as they had advocated the Revolution itself in 1775. Henry and Lee . . . joined hands in an effort at a conservative restoration. They were rivals, but they had much in common besides their hatred of Jefferson"—J. H. Eckenrode, *The Revolution in Virginia* (1916), 295.

²⁴⁸ Very notable is Monroe's letter of June 26, 1782 to George Rogers Clark, who was then in Kentucky. Monroe was then a member of the Virginia Council, interested in securing "some fix'd principle to act on," and desirous of rendering such service to the people of Kentucky as his position might make possible "when well inform'd of ye temper & tendency of things there." He therefore opened a correspondence with Clark, seeking information on all things regarding the country and its prospects. His letter contained these personal remarks: "I have a particular respect for ye exertions of these people & admire & esteem them for that spirit of enterprise wh. has so eminently distinguish'd them. . . . I have been educated to ye. law & my interest & connections are at present in this part of ye. country but have some thoughts of turning my attention toward yr. quarter & perhaps sometime hence removing thither myself"—J. A. James, *George Rogers Clark Papers* (I.H.C. 19), 68. No man knew more of the West or did more for it than Washington. His denunciations of land speculators were harsh—*Writings* (Fitzpatrick ed.), 27: 133, 486; 28: 108; but in five years preceding enactment of the Ordinance he seems only once to have referred to the "lawless Banditti" who were a part of western society

lessness was a dominant or typical characteristic of the frontier. No doubt many pioneers moved with the frontier from one location to another so long as they were failures in their last abode,²⁴⁹ leaving behind those who at each stage found sufficient security and contentment to hold them. But the simple fact that behind the ever forward-moving line the country was settled and permanently held proves the steady presence of "the hardy . . . and stubbornly persistent."²⁵⁰ No man knew better than Washington the qualities for which life on the frontier called, and in one rare instance, the only one in years when he characterized its inhabitants, "hardy" was the word he chose.²⁵¹ Up to the closing of the last frontier "The basis of Western life was essentially materialistic; people went West for land, for homes, for wealth. . . . The dominant motive was economic; and it was probably stronger in the industrious, thrifty, ambitious settlers than in their shiftless, migratory predecessors or contemporaries."²⁵²

(*ibid.* 27: 163), not as being all of it. In declining in 1787 to give information respecting it for publication in England, he wrote: "The idea . . . of it being made up of the scum and refuse of the Continent, that the people are opposed to Congress, and attached to the British government is of a piece with other doctrines and consequent publications which have recoiled upon the authors, and which one would think was enough to discourage such unfounded and short sighted reports"—*ibid.* 29: 200.

²⁴⁹ There is a striking description of such squatters by John M. Peck in R. Babcock, *Memoir of John Mason Peck* (1864), 101 *seq.* It is quoted in C. B. Goodykoontz, *Home Missions on the Frontier* (1939), at 21-22.

²⁵⁰ Carl Becker's words—*The United States: an Experiment in Democracy* (1920), 7.

²⁵¹ *Writings* (Fitzpatrick ed.), 28: 291.

²⁵² Goodykoontz, *Home Missions on the Frontier*, 23. He also quotes—*ibid.* 24—Timothy Dwight: "Under the pressure of poverty, the gaol, and the consciousness of public contempt, [they] leave their native places, and betake themselves to the wilderness"; but he also recognized that the wilderness offered hope to "the sober, industrious, and well-disposed"—*Travels in New England and New York* (1821-1822), 2: 459. In petitions from the frontier, materialistic motives for migrating seem generally not to have been admitted, although in petitions stating wants unsatisfied in the new home they were, at least as respects the Illinois Country (*post* cccli-iii), extremely prominent. Occasionally, frankness revealed them as an original motivation. For example: "With a desire to provide for Our Respective Families We have removed from different parts of the Union and Made Small Improvements in this . . . Territory"—Carter, *Territorial Papers*, 3: 48. "We had No other view in Settling but to Provide for our families: and in Some hopes of getting a Piece of Land to Live on"—*ibid.* 3: 50. "Your Petitioners is Sensible that the greatest part of the United States have been Settled or peopled by Actual Settlers or by Proclamation being Set foarth that all Such as Would Venter into the Wilderness and make Improvements and Would become Actual Settlers that all Such Should be Intitled to a Certain Quantity of land"—*ibid.* 3: 54.

It is manifest that, in general, the shiftless could only have followed the strong and dependable who created ahead of them the lure that drew the weaker on. It seems equally clear that the former must greatly have predominated either in number or influence, for that would seem to be an inescapable inference from the rapid development of the country. Free land was for generations an ever available escape from frustration. If not the greatest bonanza, in proportion to effort, that this country has ever revealed, it was certainly the most evident and widespread. For that reason the number of shiftless persons seeking to share it may have been greater than those who in later generations, as the frontier shrank, sought the same escape in successive trials of different jobs or enterprises. No doubt in the late 1700's they were very noticeable in border settlements, but no doubt also salvation of insolvents and seeming social inefficients by cheap land was a continuous miracle in those same settlements.²⁵³ To see the failures but overlook the recoveries was mere social prejudice.

The problem of lawlessness is much more complicated. Before considering how much lawlessness there was, and of what varieties, it is well to inquire how much law there was.

In the Illinois Country and on the Wabash there had been for a long time—since 1763—a paucity, and sometimes a virtual absence, of law. For two years, until the British could take possession, the supposedly French law theretofore administered in those regions remained undisturbed. When possession became British the old law continued except so far as altered by the British commandant, who did somewhat alter it in establishing a court to try “all Causes of Debt and Prop-

²⁵³ The class most heavily handicapped in rising was that of indentured servants and redemptioners. Their economic rise is therefore especially interesting. For estimates and impressions offered by students with particular opportunities to judge see especially A. E. Smith, *Colonists in Bondage: White Servitude and Convict Labor in America, 1607-1776* (1947), 285, 289, 291, 292, 298-300, 303, 304; R. B. Morris, *Government and Labor in Early America* (1946), 29, 49-50; M. W. Jernegan, *Laboring and Dependent Classes in Colonial America, 1607-1783* (1931), 45, 56; and authorities cited in Jernegan, p. 2 of ch. 3. Note P. A. Bruce, *Social Life of Virginia in the Seventeenth Century* (1927), 99, 100-103, 107; F. H. Hart, *The Valley of Virginia in the American Revolution, 1763-1789* (1942), 15, 16-19. A man did not sign the Declaration of Independence, or become a secretary of Congress, because he was once a bound servant. Such cases (Smith, 301, Bruce) are of significance far beyond what mere numbers would suggest. As respects Mr. Smith's Maryland land statistics (298-99), surely the significant figure is 1269 and not the 241 which he uses.

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erty . . . according to the Laws of England:" Under ordinary circumstances all of this would have been quite proper under principles of international law; but considering the special circumstances it was of doubtful legal basis; for by the proclamation of 1763 Great Britain—wholly forgetful of the French settlements in the Illinois Country—had left the entire Northwest outside all provision for civil government in North America, and had turned the rest of the region, temporarily, over to the Indians as a hunting ground. And yet, despite that, in view of the French appeals for government the ministry in London was thinking of law in the region through all the 1760's, and by 1767 was already inclining to the solution, finally adopted in 1774, of making it part of Quebec, subject to French law. Outside the Illinois Country no British law was established beyond provisions for taking into custody in forts and other government places in the Indian country persons there committing "crimes" or "offences" (under a law supposedly nonexistent!) thence to be taken before "the civil magistrate of the next adjoining province."²⁵⁴

Such was the situation when Virginia occupied Kaskaskia and Vincennes. Under her law virtual chaos, tempered by the sense and good conduct of the French inhabitants, existed in the Illinois Country²⁵⁵ until her authority ended in January 1782.²⁵⁶ Not even a theo-

²⁵⁴ On the British court: Alvord & Carter, *Trade and Politics, 1767-1769* (I.H.C. 16), 455 seq. (especially 455 n. 1, 463-64). On general British policy: C. E. Carter, *Correspondence of Gage*, 2: 45, 145, 151, 156, 371, 473. On colonization plans: Carter, *Great Britain and the Illinois Country, 1763-1774* (1908), ch. 6; C. W. Alvord, *The Illinois Country, 1673-1818* (1920), ch. 14; Alvord & Carter, *Trade and Politics*, index s.v. "Illinois—colonization," notably 197-99, 638; Carter, *Correspondence of Gage*, 2: 108-9. On the Quebec Act: V. Coffin, "The Quebec Act and the American Revolution," *Yale Review* for Aug. 1895, 171 at 173-76; Alvord & Carter, *The Critical Period, 1763-1765* (I.H.C. 10), xviii-xx, xxv; Alvord, *The Illinois Country*, as above; compare experiments in Upper Louisiana with French and Spanish law made by American judges—W. F. English, *Pioneer Lawyer and Jurist in Missouri* (1947), 52, 55-56, 60. On the Indian Northwest: Alvord & Carter, *The Critical Period*, 39-45 for the proclamation, also xviii, 484 n. 1, 485; Alvord & Carter, *The New Regime, 1765-1767* (I.H.C. 11), xvi.

²⁵⁵ Carter, *The Illinois Country*, ch. 4; Alvord, *The Illinois Country*, ch. 13.

Mr. Dunn has said of Vincennes: "There was the greatest abundance of government, for the more the United States neglected them the more authority their officials assumed"—*Indiana*, 188. If this were true of Vincennes it would be true of the Illinois Country. Dr. Farrand accepted it as a correct statement of general conditions—*Legislation for the Territories*, 8, and *The Fathers of the Constitution*, 71. In the writer's opinion the statement is without evidence to support it. But at any rate it refers to government, not to law.

²⁵⁶ Created a Virginia county on Dec. 9, 1778, it ceased to exist on Jan.

retical law thereafter existed anywhere in the Northwest (unless by doctrine of international law despite Virginia's renunciation) until 1787; for the Confederation was not a political entity with a law that could theoretically extend over the territory when acquired, and the ordinance of 1784 had not established any law in the territories.

This was the situation beyond the Ohio when settlement there began. On that frontier, personal freedom was originally not one under and regulated by law. It included *actual freedom from law*. We may now return to the question whether the Ohio frontier could have been reasonably expected to be—or later, when law had been established, actually was—typically or extraordinarily lawless.

No doubt that border society did include—and no doubt the frontier, as it later advanced, carried with it—some fugitives from justice, though doubtless, also, most of those would have been fugitives from the justice of imprisonment for debt.²⁵⁷ It is equally certain that an element of unruly persons was conspicuous in frontier society. Both extreme democrats like Matthew Lyon and sound Federalists such as Senator James Ross and Winthrop Sargent so testified.²⁵⁸ It

5, 1782—Hening, *Statutes*, 9: 552, 10: 303, 388; A. C. Boggess, *Settlement of Illinois*, 9.

²⁵⁷ Cf. Secretary Sargent to Secretary of State, Jan. 8, 1798—Carter, *Territorial Papers*, 3: 497. Actions of ejectment and debt were as characteristic of New York in 1800 as they were of every other territory just settling into economic stability, and equally characteristic was the migration of insolvents to the frontier—cf. Philbrick, *Laws of Indiana Territory* (*I.H.C.* 21), index s.v. "debtors," and J. T. Horton, *James Kent*, 51, 144.

Information regarding bankruptcy (or insolvency) legislation before 1829 is difficult to locate. According to Dr. Jameson, during the Revolution "four of the states ameliorated their laws respecting the imprisonment of poor debtors, under which half the population of a prison sometimes consisted of that class and a case is recorded where seven of them were kept in prison for debts aggregating less than seven pounds"—*The American Revolution Considered as a Social Movement* (1926), 119; (1940 repr.) 76. Had it not been for stay-laws and other laws of similar effect during the same period, the results of fluctuating and depreciated currency upon debtors would have been still more inhuman. The Ohio constitution of 1802 declared as a fundamental right that "The person of a debtor, where there is not strong presumption of fraud shall not be continued in prison after delivering up his estate for the benefit of his creditor"—Art. VIII, Sec. 15. Reform in the West continued. See Philbrick, as above, clxx n. 2. In the Atlantic states reform was not rapid after the war ended. For the unbelievable stupidities and inhumanities of later years see the extremely interesting materials in J. B. McMaster, *The Acquisition of Political, Social and Industrial Rights in America* (1903), 50-51, 63-66.

²⁵⁸ In a letter of Aug. 12, 1801 Lyon wrote to Jefferson: "This Country increases fast in population in industry & in Riches & I am pleased to see in this County particularly (which was first settled mostly with a kind of

seems extremely improbable that there could have been at any time at any particular part of the *old* frontier more than a very small number of professional criminals of serious types, including inactive fugitives. There was not enough valuable movable property, aside from horses, to sustain a class of thieves, burglars, or robbers. There was nothing whatever to sustain those who practiced refined commercial crimes.²⁵⁹ The one great valuable was land, and most of that was public, available to squatters of all types with an equal chance that the government would capitulate to them as pre-emptioners.²⁶⁰ Also, if from habit land already owned by other men looked better than public land, the law has always made it easier for a bad man than a good one to secure another's land by adverse possession of it. And if that was not feasible, it could perhaps be secured by fraud, perjury, or forgery; and those who were detected in using those weapons, even on a vast scale, were not treated as criminals, at least in Illinois and Missouri; the worst of them held public offices.²⁶¹

Arabs from the back part of the Carolinas) that civilization is fast gaining ground, many of the Idle & dissolute have gone to the Spanish dominions & their places have been filled up by people of more property & more industry; people possessed of some knowledge of the Comforts of civilized life and the benefits of commerce"—Library of Congress: Jefferson Papers, (transcript read in State Department).

James Ross wrote to Winthrop Sargent in 1797 of Jefferson County, Northwest Territory, newly created: "A Court has been held. & . . . the conduct of the Court & particularly of Mr. Wells was such as to impress every one with an opinion that the laws must be obeyed. A Number of the lawless will go still farther west in search of a region where, like the savages of the wilderness, they may live without restraint & we shall be well rid of such company"—Pittsburgh, Dec. 22, 1797, National Archives: Territorial Papers (transcript read in State Dept.). On Wells see Carter, *Territorial Papers*, 3: 476-77, 524. Sargent is quoted *post* n. 293.

General Parsons, doubtful whether the united states would realize benefits from western lands, wrote on Dec. 3, 1785: "The population of the country on the east of the Ohio, their views and conduct, you have no conception of; and I wish those views may not be extended further than the present settlers"—C. S. Hall, *Life and Letters of Samuel Holden Parsons*, 479. Very likely, the "views" referred to were similar to those held by the few recalcitrant squatters west of the Ohio who had been dispossessed by an army detachment in April 1785—see W. H. Smith, *St. Clair Papers*, 2: 3-5; A. B. Hulbert, *Ohio in the Time of the Confederation*, 98-109. See *post* cccxvi-vii.

²⁵⁹ Philbrick, *Laws of Indiana Territory* (I.H.C. 21), cxxvi-cxxvii, clxxi-clxxv.

²⁶⁰ There had been various state pre-emption laws in colonial time, and others after the Revolution. Squatters knew perfectly well the likelihood of gaining their end on easy terms, and petitioned Congress from the beginning of their settlements west of the Ohio (e.g. the petition of April 11, 1785 in A. B. Hulbert, *Ohio in the Time of the Confederation*, at 105) onward.

²⁶¹ Philbrick, *Laws of Indiana Territory* (I.H.C. 21), lxxv *seq.* (particularly lxxx-xc) and clxxix.

It would be a mistake, then, to be led by the picturesqueness of border lawlessness to exaggerate the *number* of criminals or of varieties of crime on the frontier. But the unruly element of its society, above referred to, while probably a very small part of the population in any but the very earliest years of settlement, was doubtless everywhere represented, and it was this element that gave the frontier its bluster, color, deeds of brutality and violence, and consequently its ill repute.

We know of the Northwest Territory—and it seems impossible to believe that the framers of the Ordinance should not have known the same to be true of the western settlements of their respective states—that as soon as there existed any border settlements meriting that name there was always a decided majority of those whose habits of social order held society together. This better element of society resented exaggerated reports of the lawlessness of their settlements.²⁶² They did, in fact, tolerate a vast amount of violence that people from older communities, where such conduct was rare, would have assumed to be outside the law, though most of it was for all practical purposes within it. It was condoned by the mores of the border, and that fact put it beyond judicial correction, because of two principles, centuries old, of the common law. This was true, for example, of gouging, biting, and other brutalities whenever a plea was available of self-defense when attacked or of license in contests of strength and skill. The Ordinance was passed, the common law introduced, special statutes were sooner or later passed against riots, dueling, mayhem, and so on; but under most of them no indictments were ever brought, and in those for aggravated batteries ridiculously small fines were imposed.²⁶³ The same principles of law would have applied in the Atlantic states; the outcome would in very many cases have been the

²⁶² The inhabitants of Shawneetown produced with evident travail a protest to Matthew Lyon: "We must beg leave to make mention with diffidence least a misconception be prepossessed from misrepresentations that there are amongst our number both Moral and Relidgeous as well as many enterprising and industrious people"—letter of Nov. 13, 1809, in National Archives: Territorial Papers (transcript read in State Dept.).

²⁶³ On crimes, statutory penalties, and actual treatment see Philbrick, *Laws of Indiana Territory* (I.H.C. 21), cxxvi-cxxvii, clxxi-clxxxii, ccxxiv. This careful analysis of statutes and court records is presumably fairly representative of the general situation in the first decade of the *early* border. The situation fifty years later was very different as respected property, crime, and courts.

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same. But in fact, though it sounds paradoxical, because there *was* more of this type of violence on the border it was less likely to be dealt with by law. For its abundance indicated the local mores as favorable to it; and, consequently, peace officers were less likely to act against it, and juries less likely to give verdicts for damages or of guilt in prosecutions for crimes. To a layman such tolerance may seem merely to illustrate the truth of Garrick's adage that a fellow-feeling makes us wondrous kind—and it does; but it also illustrates the important fact that the only law enforced is what the public desires; that law must be near to the people.

But, in this respect, was the attitude of those who repudiated Jefferson's ordinance justified? Yes, and no. As regarded *the fault to be guarded against*, yes: these community practices, *as respects their frequency and aggravated character*, were the very "depravity of manners" of which Duane's committee complained in October 1783. It was the very conduct which called for the protection of "purchasers and inhabitants"; which necessitated a government that would establish "order and the true principles of government." On the other hand, as respects the question whether the Ordinance was a necessary or a proper guard against the frontier's "depravity of manners," the answer is no;—and for two reasons. The first is that just explained: that the statute book never cured the violence of any frontier, nor did the titles and mere presence of peace officers, but only the changing manners of society. When the change had come the routine action of officers and juries registered it.

The second reason is that, as already remarked, it is illogical to assume that the noisy individualism that was expressed in the lawlessness just considered had any necessary relation to disaffection for the Union. Such an assumption supposes the border population to have lived in such a rage of disorder that they would bear the yoke of no government, nor therefore enter the Confederation. In truth, what the Watauga associates said in their petition of 1776 to the North Carolina assembly expressed the attitude of every frontier community, for in every one of them people of stable habits soon established their dominance. It was this:

Finding ourselves on the Frontiers, and being apprehensive that, for the want of a proper legislature, we might become a shelter for such as endeavoured to defraud their creditors; considering also

the necessity of recording Deeds, Wills, and doing other public business; we, by consent of the people, formed a court for the purposes above mentioned, taking (by desire of our constituents) the Virginia laws for our guide, so near as the situation of affairs would admit.²⁶⁴

Consider, as another example, the unlawful intruders on the public domain who had crossed the Ohio by the spring of 1785. Some few hundreds of these (out of uncertain thousands) were evicted at that time from the bottoms between Fort McIntosh and Wheeling. Among them was one individualist who, after having seemingly received legal advice, proclaimed "that all mankind agreeable to every constitution formed in America"—and two literally supported him²⁶⁵—"have an undoubted right to pass into every vacant country, and there to form their constitution"; also that Congress had no power under the Articles of Confederation to forbid them to do so, or to sell the land;²⁶⁶ and probably very few historians are even today entirely clear why it was that Congress *had* the power otherwise.²⁶⁷ There was one other man, too, who threatened forcible resistance to eviction under orders of Congress. The young officer reported to Colonel Harmar the opinion of "many sensible men" east of the Ohio ("reputable inhabitants," Harmar called them in a letter to Congress) that only prompt action by that body could prevent settlement of the country west of the river "by a banditti whose actions [were] a disgrace to human nature."²⁶⁸ But, clearly, there is something wrong with that epithet. These were pioneers, though not of the type of Daniel Boone. Yet even of them some had already elected justices of the peace. Moreover, though the above proclamation was "posted

²⁶⁴ J. G. M. Ramsey, *The Annals of Tennessee to the End of the Eighteenth Century* (1853), 136.

²⁶⁵ Namely those of Vermont and Pennsylvania; see nn. 263, 305 of Sec. II. Originally no distinction was made between unsettled lands "outside" or manifestly inside a state (for could there be any outside until after 1784?). But when separatism threatened the great states, Pennsylvania made it treason by an act of 1782 to erect an independent government within her limits—*The Statutes at Large of Pennsylvania*. 11 (1906): 14; and Virginia did the same in 1785—Hening, *Statutes*, 12: 41.

²⁶⁶ See the "Advertisement" of John Amberson in *St. Clair Papers*, 2: 5 or A. B. Hulbert, *Ohio in the Time of the Confederation*. 98-99.

²⁶⁷ *Ante* lxxvii *seq.*

²⁶⁸ Ensign Armstrong's letter (n.d.) to Governor St. Clair, in W. H. Smith, *St. Clair Papers*. 2: 4. "Banditti" was seemingly a popular word. Washington used it once in 1783—*ante* n. 248. Lord Dartmouth wrote to General Gage of Vincennes in 1773: "seeing that the inhabitants there no longer appear to be a lawless vagabond Banditti, as they have been represented to be," etc.—C. E. Carter, *Correspondence of General Gage*, 2: 157.

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up in nearly every settlement on the western side of the Ohio," inviting the people to elect on a common day delegates to form a constitution and state, nothing came of it; at least a portion of them joined instead in a memorial to Congress.²⁶⁹ All within the district in question—certainly at least a few hundred persons—after their homes had been destroyed, moved back across the Ohio, having permitted an ensign with a detachment of twenty soldiers to dispossess them.²⁷⁰

There seems to be no reason whatever to attribute to the Northwest an unwillingness to accept the rule of the Union.²⁷¹ The federal government had never oppressed them. It offered them satisfaction of all their hopes. It was the states that had created in their western portions resentment and political unrest. Shays' Rebellion took place in a state amid whose ruling class such a mind as Fisher Ames's could be at ease.²⁷² The western border from Maine to the backlands of South Carolina had suffered from political and economic discrimination,²⁷³ and its inhabitants doubtless left for the new federal territories with hopes that must have been heightened by their consciousness of the unjust opinions entertained of them by their more eastern fellow citizens.²⁷⁴ The truth is that the settlers of the Northwest

²⁶⁹ Hulbert, *op. cit.* at 103-6.

²⁷⁰ Colonel Harmar to Congress, May 1, 1785 and Armstrong letter cited *ante* n. 268—W. H. Smith, *St. Clair Papers*, 2: 3-4; formal report of April 12 by Ensign Armstrong to Colonel Harmar in A. B. Hulbert, *op. cit.* 106-9.

²⁷¹ Nor to the Southwest—S. C. Williams, *The Lost State of Franklin*, 49 n. 6.

²⁷² He wrote, for example, on June 11, 1789 from Congress to Thomas Dwight (compare n. 301 *post*): "Mr. Madison has introduced his long expected amendments. . . . He has hunted up all the grievances and complaints of newspapers, all the articles of conventions, and the small talk of their debates. It contains a bill of rights, the right of enjoying property, of changing the government at pleasure, freedom of the press, of conscience, of juries, exemptions from general warrants, gradual increase of representatives. . . . Oh! I had forgot, the right of the people to bear arms. *Risum teneatis amici?*"—*Works* (1854), 1: 52-53.

²⁷³ F. J. Turner, *The Frontier in American History* (1920), 110-24; W. A. Schafer, "Sectionalism and Representation in South Carolina," *Amer. Hist. Assoc. Report*, 1900, 1: 324, 353, 400-437; J. S. Bassett, "The Regulators of North Carolina, 1765-1771," *ibid.* 1894, pp. 150-55, 160, 162-63, 165, 208, 211-12; C. H. Lincoln, *Revolutionary Movement in Pennsylvania* (University of Pennsylvania, *Publications . . . History*, 1896), ch. 3-4; W. R. Shepherd, *The History of Proprietary Government in Pennsylvania* (Columbia University *Studies in History*, 1896), 546-48; M. Farrand, "The West and the Principles of the Constitution," *Yale Rev.* 17 (old series, 1908-1909): 44-58; E. B. Greene, *The Revolutionary Generation* (1943), 166-68 and 407-11.

²⁷⁴ Judge Williams states that language used in the debate over North

would naturally accept the Union for two reasons: one, because many of them looked upon the states they had left as oppressors, and upon the Union as offering them succor from the past and promise for the future; another, because they came from different states. A petition from Kentuckians, praying for independence, was directed in 1782 to Congress because, the petitioners said, they owed no allegiance to Virginia, whose charter the Revolution had abrogated, but acknowledged allegiance to the united states upon which the rights of the Crown had devolved. Whatever might be said of the merits of these legal propositions²⁷⁵ there underlay them the important fact that men who deserted one or another of the Atlantic states never ceased to think of themselves as Americans. It seems probable that after the first decade in Kentucky and Tennessee no small border settlement would have lacked representation of at least two states, and as time passed the number represented greatly grew. Frontier sentiment was always nationalistic.²⁷⁶

Carolina's cession act to the Confederation by some members of the General Assembly was especially resented. "When the members from the western country were supplicating to be continued a part of your State, were not these your epithets: 'The inhabitants of the western country are the off-scourings of the earth, fugitives from justice and we will be rid of them at any rate'?"—Address of the Franklin Assembly, March 22, 1785 to Governor Martin of Tennessee, S. C. Williams, *The Lost State of Franklin*, 28.

²⁷⁵ See *ante* lviii-lxiii.

²⁷⁶ Mr. Nevins has expressed the same opinion in his *American States, 1775-1789*. Compare remarks in A. C. Flick, *History of the State of New York*, 5: 165 on settlement of central and western New York following 1790.

At the time Morgan was seeking colonists for New Madrid, Governor St. Clair wrote of landless Kentuckians: "There is no doubt many of these will readily join him, for they have no country, and indeed that attachment to the *natale solum* that has been so powerful and active a principle in other countries is very little felt in America"—letter of Dec. 13, 1788, to John Jay, W. H. Smith, *St. Clair Papers*, 2: 104. In much the same way he later wrote in 1799, of the people of the Northwest Territory: "They are too far removed from the seat of government to be much impressed with the power of the United States. *Their connection with any of them is very slender*—many of them having left nothing but creditors behind them, whom they would very willingly forget entirely. Fixed political principles they have none, and *though at present they seem attached to the General Government*, it is in fact but a passing sentiment, easily changed or even removed, and certainly not strong enough to be counted upon as a principle of action; and there are a good many who hold sentiments in direct opposition to its principles, and who, though quiet at present, would then take the lead"—W. H. Smith, *St. Clair Papers*, 2: 482; italics added. This is obviously in the main philosophizing, but the italicized passages are what he actually observed, and they are important.

On the true sentiment in Kentucky regarding both Wilkinson and Connelly see Morgan's reports—Savalle, *George Morgan*, 210, 225: The two

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Everything seemingly supports the opinion of William Henry Smith that the squatters above referred to as evicted from the Ohio bottoms "were equal to self-government, and, if undisturbed, would soon have laid the foundations of a state on the Ohio."²⁷⁷ As a matter of fact, since the Ordinance of 1787 provided no law to be immediately effective in the Territory it created (but left it to the governor and judges to establish it later), it was necessary for the first settlers at Marietta to establish their own law *just as frontiersmen did everywhere else*;²⁷⁸ and more than fifteen weeks passed before the first law, of the scanty legal product of 1788, was passed by those officials.²⁷⁹ Even without the encouragement given by Jefferson's plan of 1784 states would naturally and readily have arisen everywhere on the border. *His plan merely regularized a natural pro-*

opening toasts drunk at a Louisville Fourth of July banquet in 1788, as reported by Brissot de Warville, express rather well the dress-parade aspect of western sentiment. The first: "L'univers occidental—Union perpétuelle sur les principes d'égalité, ou séparation amicale." The second: "La Navigation du Mississippi à tout prix, excepté celui de la liberté"—*Nouveau Voyage dans les États Unis . . . fait en 1788* (1791), 2: 422.

²⁷⁷ W. H. Smith, *St. Clair Papers*, 2: 5. He actually made the statement of Amberson's "Advertisement" alone; as qualified in the text, the writer agrees. In the petition of April 11th (or 5th—Hulbert, *ante* n. 266, at 108), the petitioners avowed a desire to act in strictest accord with the consent of Congress ("the legislature"), that they had made their entry "under the protection of Government," and never dreamed until evicted that it was considered "prejudicial to the Common good"—*ibid.* 104-5. Since they crossed from Pennsylvania, it seems fair to conclude from the petition of April 7, 1785 by inhabitants of Washington County of that state (printed in Hulbert, *Ohio in the Time of the Confederation*, 100) that it would be fair to attribute to the petitioners of April 11 (*ibid.* 103) the intent to make Jefferson's ordinance the basis of their actions; and under it they would have been fully justified in making the allegations quoted. With this petition compare that of an earlier date from Washington County, Virginia, discussed by F. J. Turner in the *Amer. Hist. Rev.* 1: 260 and by S. C. Williams, *The Lost State of Franklin*, 49.

²⁷⁸ The first settlers arrived at Marietta on April 7, 1788. Col. John May recorded in his diary for May 17: "This evening Judge Putnam's and General Varnum's commissions were read; also, regulations for the government of the people"—by whom framed? "In fact, by-laws were much wanted. Officers were named to command the militia; guards to be mounted every evening"—A. B. Hart, *Amer. History Told by Contemporaries*, 3: 104. The directors of the Ohio Company acted as a Board of Police; as such issued regulations of community conduct and fixed punishments for violations; also organized the militia—"Sidelights on the Ohio Co. of Associates from the John May Papers" (1917), Western Reserve Historical Society *Tract No.* 97, 104, 105, 110-12.

²⁷⁹ Governor St. Clair, who should have been there from the beginning, arrived on July 9—W. H. Smith, *St. Clair Papers*, 1: 138. The first law of the governor and judges was passed on July 25—T. C. Pease, *The Laws of the Northwest Territory, 1788-1800* (I.H.C. 17), 1.

cedure, and gave national control over such movements—which was particularly important.²⁸⁰ Political compacts or associations have been common products of the Anglo-American genius for self-government from the time of the Mayflower onward.²⁸¹ The inhabitants of the state of Franklin acted under the inspiration of Jefferson's ordinance.²⁸² Whether *written evidence* does or does not exist that it was relied upon in the initiation of projects for new governments north-west of the Ohio,²⁸³ it surely must have been known to and relied upon by settlers on that frontier. Jefferson merely authorized the men of the frontier to do what they had been doing and would do anyway. That was true even as respects the detail of allowing them to elect, as soon as any number of them desired, the state under whose law they wished to live pending the right to form their own consti-

²⁸⁰ Professor Turner's map in the *Amer. Hist. Rev.* 1: 75 would indicate that a federal statute was as much needed to control irregularities in state-making as the land ordinance of 1785 was needed to replace indiscriminate locations of private claims.

²⁸¹ S. C. Williams, *The Lost State of Franklin*, 1, 29 (Watauga); 31, 46, 226; F. J. Turner, "Western State-Making in the Revolutionary Era," *Amer. Hist. Rev.* 1: 76-78, 266; *ante* n. 14 for Judge Lobingier's book. Of this no better example can be found than was given in the Western Reserve. Connecticut would not govern it; the Connecticut Land Company did not; the Northwest Territory could not—*ante* lxxxi-iii. Under these circumstances the people governed themselves. "Lands were bought and sold; contracts relating to personal services were entered into; marriages were solemnized. . . . But there was no government whatever; no laws or records; no magistrates or police. The people were thoroughly trained in civil obedience; they were orderly and fully competent to govern themselves; and yet, in these three or four years, the need of civil institutions began to be severely felt. The lack of records, in particular, was a source of much embarrassment"—Hinsdale, *Old Northwest*, 376.

These habits of order and social tradition which hold societies together were everywhere in evidence on the frontier. It is they, and not the social compacts of political philosophy or the pseudo compacts of the Ordinance of 1787, to which is due the culminating tribute paid to that instrument by Mr. Pease: "the highest and most sacred guarantee, the most practical and stable cement of states and governments is the free and unforced covenant and agreement of man and man"—address cited *ante* n. 176, at 180.

²⁸² S. C. Williams, *The Lost State of Franklin*, 28, 29, 31, 87, 92. Mr. Barrett showed, in his *Evolution of the Ordinance of 1787* (at 16) that the boundaries of some of Jefferson's states cut below the Ohio and *directly* suggested some organization of self-government there; Judge Williams likewise points out that most of the Holston-Watauga settlements were so provided for—*The Lost State of Franklin*, 29 n. 7, 34. He also points out that the North Carolina constitution of 1776 suggested one or more governments in western North Carolina (sec. xxv of the Declaration of Rights)—*ibid.* at 29 and n. 7. But the reference in the text is to the invitation implicit in the text of Jefferson's provision offering self-government under the laws of any state which settlers might elect—*ante* ccliv.

²⁸³ In the petitions cited in nn. 260, 269 *ante*.

tution; the Wataugans had chosen Virginia, and those of Franklin chose North Carolina.²⁸⁴

It has been noted that the freedom of pioneers in the Northwest before 1787 was theoretically—and for a time thereafter actually²⁸⁵—a freedom from law in a literal sense. It was like a return to a state of nature, and yet these children of nature began immediately to set up governments. These, however, were their own governments. No doubt the first backwoodsmen wanted primarily to be let alone; they wanted nothing of government or taxes; felt little need for courts. But when that changed with the influx of persons with something saved and to be guarded, or at any rate desirous of living a secure and settled life, what was the legal order that they demanded?

It is interesting to read, with that query in mind, the popular petitions forwarded to Congress from the western country during the first twenty years after passage of the Ordinance of 1787. There are notable differences between those sent from the French of the Illinois Country and those sent by Americans of all quarters. The former seem to be conscious of the fact above stated; they prayed for *stronger* government, for law and order, for protection of common rights of person and property upon which American immigrants were tramping.²⁸⁶ They were not accustomed to emphasize distinctions between local and distant government, or between self-government and imposed government, and those distinctions did not confuse the larger issue. The Americans, on the other hand, sought local government. They did not say they wanted stronger government, nor with very rare exceptions that they wanted more law and order; the weaker the administration, possibly the better it might have suited at least some of them. Indirectly, they sought personal power; directly, they sought favors. They dilated on the hardships they had endured; they exaggerated the obligations under which they had supposedly placed the Union by reducing a wilderness to "cultivation"; they represented

²⁸⁴ *Ante* at notecall 264; and S. C. Williams, *The Lost State of Franklin*, 227. This was merely doing what was done in various territories later on. The constitution or statute book available, or the one from the state whence the majority of the legislature or constitutional assembly came, has probably invariably determined the basic law of each new state.

²⁸⁵ For the reason stated above in the text—that the Ordinance provided the Territory with no law to be immediately effective.

²⁸⁶ Alvord, *Kaskaskia Records* (I.H.C. 5), 65, 89, 92-93, 233-40, 329-40, 369, 381-82, 509; Carter, *Territorial Papers*, 2: 60 and 3: 76; St. Clair to Secretary of War, May 1, 1790 in W. H. Smith, *St. Clair Papers*, 2: 137.

that they had migrated "under the protection of the State of Virginia . . . Sovereign of this territory," and asked for the confirmation of old French claims which they had taken over; or, at any rate, in virtually every petition they asked for land.²⁸⁷ No petition is to be found for *more* government unless *through* self-government, and that is found subject only to various qualifications.

The first is, that the prayer for even self-government is only inferential. In not one petition is there a direct demand for local self-government. In not one is there any panegyric upon self-government, nor even a restrained encomium of it. The explanation of this is, seemingly, that there was no need to eulogize what every American desired or to ask for what every frontiersman enjoyed, within or without the law. Local self-government was in fact enjoyed from 1788 onward on the Wabash and from 1790 onward in the Illinois Country.²⁸⁸ It is also true that the Ordinance had set the terms on which self-government could be had—but for what purposes does the right of petition exist? Is it possible that a belief that *all* of the Ordinance was an unalterable compact had throttled all impulse to pray for a change in what was merely a legislative provision, alterable at will by Congress? What the petitions complained of was the inconvenience and expense of *distant* government;²⁸⁹ but this might conceivably indicate no more than a choice between two evils; a preference for local government if any must be endured.

The second qualification is that of the petitions which thus apparently evidence, by implication, a desire for local government, very few indeed fall within the suggested period of twenty years; yet it seems absolutely certain that within that time any given portion of the western country would have passed far beyond the stage of

²⁸⁷ See Carter, *Territorial Papers*, 2, 3, and 7: index s.v. "Petitions"—particularly 2: 69.

²⁸⁸ In addition, as regards prominent citizens likely to promote petitions, there was local enjoyment of patronage available under the territorial government. In an earlier reference to political patronage disposed of by the territorial government—Philbrick, *Laws of Indiana Territory (I.H.C. 21)*, lvi-ix—I overlooked contracts for carrying the mail. From Carter, *Territorial Papers*, index of vols. 3 and 7 (s.v. "Mail," "postal service") it appears that some enemies of Governor Harrison held such contracts up at least to 1808—3: 19, 70, 79; 7: 410, 554, 582.

²⁸⁹ *Ibid.* 7: 99 (inhabitants of Detroit to Congress, March 20, 1803), 118 (same to same, Sept. 1, 1803), 227 (same to same, Oct. 24, 1804), 140 (inhabitants of Illinois Country to same, Oct. 26, 1803), 545 (same to same, April 6, 1808).

nomadic pioneers to that of secondary or possibly tertiary settlement.

The third qualification is that when one draws even inferentially from the petitions a desire for self-government one must ignore the fact that nearly every petition was grounded in politics, being intended either to advance the personal ambitions of a local group or to discredit personally the opponents of decentralization.²⁹⁰

Finally, a fourth qualification is that the demand for closer local control of government was in part motivated by a desire for looser government—less taxes, a stronger position for the defense of slavery, and security against investigations of land claims. More localized control of government insured a more strategic position in territorial politics.²⁹¹

Any government necessarily checked the freedom of the pioneer. It necessarily involved, in fact, a promotion of the common welfare over individual liberty.²⁹² But the petitions conclusively show that even in border society far advanced beyond the stage of wilderness outposts (the old French settlements in early years excepted) there was no prayer for an *absentee* government to check frontier liberties. With such a government there was slight contact and slighter sympathy.²⁹³ Absenteeism “was close,” Mr. Paxson has said, “to the

²⁹⁰ Compare the Illinois Country petitions cited in the last preceding note with Philbrick, *Laws of Indiana Territory* (I.H.C. 21), xx-xxxix, xlv-xlix.

²⁹¹ *Ibid.* and lxiv.

²⁹² Mr. Buck remarks, in defending against unduly harsh judgments the early settlers of western Pennsylvania, that “Most of them . . . desired the establishment of local government, with its two-fold purpose of acting for the general welfare . . . and of limiting the liberties of individuals”—S. J. Buck, *Civilization in Western Pennsylvania* (1939), at 430. It is only as subject to the doubts set out in the text that this statement could be taken as true of the Northwest Territory.

²⁹³ “People from various parts are flocking in, and principally establish themselves below the great Miami . . . some of them expect, I am told to obtain a pre-emption farm settlement, and the greater part are induced by its remoteness from the magistrates of Knox County; of wh. it is a part;—*to be as free as the Natives*”—that is, the Indians: Sargent to Secretary of State, Jan. 20, 1797, Carter, *Territorial Papers*, 2: 587. Mr. Buck has written of western Pennsylvania that to assertions of legal control by distant government the pioneers sometimes opposed united force—*Civilization in Western Pennsylvania*, 451. This would seem very natural there, and very extraordinary if in the Illinois Country. No such instance in Illinois is known to me. Nor have I noted in Illinois records definite information regarding popular judgments between prior “tomahawk rights” and later “settlement rights” (*ibid.* 431); probably because the land commissioners disposed of such disputes—Philbrick, *Laws of Indiana Territory* (I.H.C. 21), lxxxiv n., citing pages in *American State Papers, Public Lands*, where the

Revolution. . . . The American grievance was less that government was bad, than that it was remote and beyond control.''²⁹⁴ It was remoteness, particularly of courts, of which the inhabitants of the Illinois Country constantly complained in their petitions; and the same was true, with less need and perhaps less emphasis, of petitions from other frontiers.²⁹⁵ The petitions were in the tradition of the Revolution.

Not so the Ordinance of 1787. That instrument was perverted, seemingly, by a spirit of obstinate shortsightedness developed in dealing politically with the backlands of the individual states. All of these had had to deal with that problem since early colonial times, and none seems to have dealt with it generously or successfully. Border grievances were everywhere substantially the same; some amounted to exploitation by the dominant older section of the state; some represented mere neglect; all reflected social prejudice, and all denied democracy. As Max Farrand said, "At the very time our fathers were complaining of the gross injustice of their treatment and the invasion of their rights at the hands of Great Britain, they themselves were committing offences of the same sort and were disregarding the same rights in the treatment of their fellow countrymen."²⁹⁶ All the history of border discontents and "compact" governments was well known in Congress. Out of it arose in the large states the specter of separatism which has left its mark in the Con-

commissioners dealt with improvement claims. Nor have I found in Illinois evidence of the operations of "Fair Play Men" who gave or refused permission to occupy land vacated by earlier squatters (Buck, *op. cit.* 430-31). Certainly, however, there was co-operation among pre-emptioners in bidding, and evidence on the other matters very probably exists in sources not (or imperfectly) examined; however I should think armed resistance to government there most unlikely.

²⁹⁴ *American Frontier*, 97; compare C. H. Van Tyne, *Causes of the War of Independence* (1922), 18, 30, 313.

²⁹⁵ Philbrick, *Laws of Indiana Territory* (I.H.C. 21), xi, xxiv, xliii-xliv, li-iii, liv; in the remonstrance of inhabitants of Lancaster, York, and other inland (but not remote) counties of Pennsylvania the complaint (1764) was rather of prejudice if tried in Philadelphia—*Minutes of Provincial Council*, 9: 138; F. H. Hart, *The Valley of Virginia in the Amer. Revolution, 1763-1789*, 62-65; C. H. Ambler, *Sectionalism in Virginia from 1776 to 1861* (1910), introduction; A. C. Flick, *History of the State of New York*, 4: 175-78; S. C. Williams, *The Lost State of Franklin*, 226, 348, 115; A. W. Putnam, *History of Middle Tennessee* (1859), 91-102; E. Stanwood, on grievances of Maine (1786), *Mass. Hist. Soc. Proceedings*, 1907-1908: 128-34.

²⁹⁶ "The West and the Principles of the Constitution," *Yale Rev.* 17 (old series, 1908-1909): 55.

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stitution of the United States²⁹⁷ and in the statutory history of treason.²⁹⁸ But all of it was ignored in drafting the Ordinance of 1787.

The objective of its draftsmen can be fairly stated to have been the creation of a government calculated to teach citizens order, sobriety, and "the true principles of government." Reasons have been given for the opinion that the Ordinance's system did not teach them order and sobriety; nor did any later statutes passed for other territories. Time, and gradual changes in the social standards of border society slowly brought those qualities into territorial life.

As for *self-government*, surely, no teaching of that was ever needed. Excepting only the few states whose original inhabitants were wholly or largely foreigners there has been none that even theoretically could have needed, prior to admission to statehood, any tutelage in self-government. Even as respects those few states, who would say that tutelage was more needed in the cases of Louisiana, Florida, Arizona, and New Mexico, which received it, than in the cases of Texas and California which did not? The western inland frontier differed very little, as respects the origins and general characteristics of its population, from the earlier seaboard frontier that had become the original thirteen states. The inhabitants of the latter had never doubted their own capacity for self-government. Of course they reasonably conceded it to Vermont—which had, also reasonably, proclaimed it against all the world. They conceded it likewise to the settlers of Kentucky in not subjecting them to a territorial status, although those settlers had a vastly more unruly background than that of the early settlers of the Northwest Territory and their fitness (from a conservative's viewpoint) to "act for themselves" should have appeared far more open to suspicion. In truth, sectional politics entered into these early cases as it did into all later cases, to exclude consistency: the balance of free against slaveholding states, beginning with Vermont and Kentucky; the struggle, in choosing a population requirement for admission to the Union, for a state in the Northwest to favor "eastern" or "southern" political interests. It has always been assumed by eulogists of the Ordinance that its purpose in delaying conferment of state government was to teach self-government. The record contradicts the claim, and also shows that the tradition of

²⁹⁷ Art. IV, sec. 3.

²⁹⁸ *Ante* n. 265.

actual tutelary training is a mere myth. Apologies for it as in the exculpatory phrases of Monroe's first committee report,²⁹⁹ were never other than pure sophistry. Perhaps the members of the committee recognized that, for when Dr. Johnson was made chairman of the reconstituted committee all those phrases, and all the context explanatory of the purpose of the governmental plan in which they were embodied, were omitted,³⁰⁰ and the facts of the plan were left to speak for themselves. It still rested, however, on the same fallacious assumptions and, measured against the dominant political faith of the day, still spoke with the same sophistry as before.

But, in fact, the draftsmen of the Ordinance did not regard *self-government* as covering, or perhaps as included in, "the true principles of government." It has been remarked that the Ordinance assumed that even the seemingly ideal emigrants of the Ohio Company were incapable of self-government. In truth, the implication of its governmental plan was not precisely that; it was, rather, that even those settlers could not be trusted to maintain *proper* self-government—that is, one accordant with the desires of Dane and like-minded conservatives. The impropriety they feared was an *excess* of self-government. What Dane and King and Kent wanted was not merely a frontier life as ordered under the laws of Massachusetts or New York; for those laws permitted in the border societies of their states the social crudities, the license of squatters, the partial security of emigrants liable to imprisonment for debt, against which they revolted. What they wanted was a frontier society accordant with their personal and class conceptions of self-control and propriety. Quite logically, for them, they regarded in the same way the frontiers of the states and of the Union. To a fellow conservative Dane wrote that "our frontier inhabitants from New Hampshire to Georgia . . . will give us much trouble in a few years if we do not treat and govern them with much prudence and good policy."³⁰¹ This meant that the

²⁹⁹ Quoted *ante* at notecall 114.

³⁰⁰ Compare *Jour. Cont. Cong.* 30: 403, 405 with *ibid.* 31: 669, 672.

³⁰¹ To Thomas Dwight, March 2, 1787—Burnett, *Letters*, 8: 556. It meant something quite different when Washington wrote in 1785: "*unless we can connect the new State . . . with those on the Atlantic by interest, (the only binding cement . . .), they will be quite a distinct people; and ultimately may be very troublesome neighbours to us. In themselves considered, merely as a hardy race, this may happen; how much more so, if linked with either of those powers*"—Spain or Britain—"in politics and commerce"—*Writings*

laws should give the writer's class political and economic security against western liberalism. It is easy to understand why Dane accepted even the Ordinance of 1787 as merely the best government it was possible to secure. The Ordinance was a successful attempt to gain for reactionaries the control over federal territories which liberals had wrested from them in their own states.

So they created a true colonial system, and it is worth while noting that its framers were influenced in so doing by exactly the same economic and political considerations as those that had determined British colonial policy. There was the same fear that the distant plantations would grow away from the mother country. Burke had noted, for example, how Pennsylvania was in "danger of being wholly foreign in language, manners, and perhaps even inclinations."³⁰² With infinitely less reason one could collect similar judgments, language aside, regarding the inland and cross-mountain frontiers. Regardless, again, of the proper interpretation of the proclamation of 1763, as marking or not marking its beginning, it is certain that a British policy of colonization in the West gained headway in later years, and presumably everybody would concede to that policy the objectives which Lord Hillsborough regarded as "two capital objects" of the original proclamation—namely, that of keeping all settlement "within the reach of the trade and commerce of England," and of keeping settlements "in due subordination to, and dependence upon, the mother country."³⁰³ Could the aspirations of Jay and King and accomplishments of Jefferson's revisers be better stated? Mr. Alvord thought that some in the British government might have had "a real fear of western expansion," that "there may have been also the fear of de-

(Fitzpatrick ed.), 28: 291; and compare 29: 192. Different because of its qualifications, and because Washington was devoting all his time to open up easy ways of commerce to the Northwest—*ante* n. 123.

³⁰² *An account of the European Settlements in America* (1765), 2: 201.

³⁰³ Franklin, *Works* (Bigelow ed.), 5: 4, 75. The Board of Trade reported favorably to the Privy Council in 1748 on settlement of the trans-Appalachian country—G. H. Alden, *New Governments West of the Alleghanies before 1780* (1897), 40-41. Such talk began at least as early as the organization in 1738 of the first Virginia county west of the Blue Ridge—*ibid.* 1, 2. One colonization scheme ended in frustration only because organization as a Virginia county was more feasible; another was approved by the British government, but final action was prevented by the Revolution. A vast amount of data relating to western land companies and state projects is provided in T. P. Abernethy, *Western Lands and the American Revolution*, which in fact carries the story down to 1779.

populating Great Britain.³⁰⁴ The people of the colonies were forbidden, naturally, to pass laws repugnant to the laws of England.³⁰⁵ The requirements of the Ordinance that laws for the Northwest Territory's government be at first selected from laws of the original states, and later—when passed by a local legislature—be subject to disallowance by Congress, had the similar purpose of preserving the colony's political virtue. In short, the Ordinance rested upon the familiar reasoning of all colonial powers.

In repudiating the political doctrines and practices of the frontier, which Jefferson's ordinance accepted, the Ordinance of 1787 repudiated principles of the Revolution. No justification can be found for this unless the dangers supposedly latent in frontier habits and liberalism really existed. It has been submitted that they did not, and—which is both more important and more disputable—that there were not reasonable grounds for believing them to exist. Rumors and gossip were rife, but Washington thought that all danger of western nonadherence to the Union would disappear if trade could be established with the West.³⁰⁶ In Jefferson's opinion that area would be lost only if its interests were unfairly dealt with;³⁰⁷ that is, only if the Atlantic states persisted in their unjust border policies.

But even had there been excuse for the Ordinance in 1787 the excuse soon ceased to exist. No one would today deny that the insubstantial nature of the fears on which that instrument's governmental plan rested was entirely clear after the War of 1812. Few would deny that any possible earlier justification of those fears was wholly removed by the Louisiana Purchase. It is also entirely clear that if there had at any time existed in the western country any

³⁰⁴ C. W. Alvord, *The Mississippi Valley in British Politics* (1917), 2: 161, 189.

³⁰⁵ "With the exception of the first charter of Virginia, of 1606, the royal charters, in constituting the colonial governments, provided that the local legislation should not be contrary to the laws of England, or that it should be conformable as near as might be to the laws of England"—J. C. Hurd, *The Law of Freedom and Bondage in the United States* (2 vol. 1858-1862), 1: 119. The latest review of the English field is in two articles by Professor D. O. McGovney, "The British Origin of Judicial Review of Legislation" and "The British Privy Council's Power to Restrain the Legislatures of Colonial America: Power to Disallow Statutes: Power to Veto" in *University of Pennsylvania Law Review*, 93: 1-49 and 95: 59-93, respectively. See also O. M. Dickerson, *American Colonial Government 1696-1765: a Study of the British Board of Trade* (1912), ch. 5.

³⁰⁶ *Ante* n. 123.

³⁰⁷ *Ante* ccxcī and nn. 68, 122.

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disaffection toward the Union, such disaffection must have been aggravated by the Ordinance's temporary denial of and permanent restriction upon self-government; and this aside from the exclusion of the territories from the federal system save for the tenuous thread of one nonvoting representative of each in Congress. Once an end was put to the anxieties of settlers along the Mississippi over obstructions to commerce at New Orleans, any remaining danger of a desire in the West for statehood outside the Union, if such existed, could have arisen only from the unrest created by the Ordinance itself. That there never eventuated in any early territory, despite these illiberal provisions, any overt movement or even threat of resistance to government, is good evidence that nationalistic spirit was strong and separatist sentiment nonexistent or negligible. The Ordinance's plan was therefore inadequately considered, because the foreign dangers it was intended to counteract proved to be insubstantial even in early years, and because the domestic dangers which it sought to minimize proved to be equally insubstantial even with the additional irritant of the Ordinance's ungenerosity.

Mr. Farrand once wrote that

The western country and its people presented no easy problem to the United States: how to hold those people when the pull was strong to draw them from the Union; how to govern citizens so widely separated from the older communities; and . . . how to [gain for all the states and] hold the land itself.³⁰⁸

The third of these problems was substantially solved when Virginia's cession was made in 1784. It had been, indeed, a difficult one, for it involved not only obstinate rivalries between the states but the problem of deciding whether *all* the states should commit themselves to a great advance in federalism.³⁰⁹ Nevertheless it was rightly solved; and solved as the answer to that question had from the first been instinctively voiced by Congress. The first and second problems were difficult only because in many political problems actual facts are less important than imagined facts. Imagined facts—assumptions that had scanty factual basis respecting foreign relations—equally false assumptions, resting on mere social prejudices, respecting the character of frontier society—perverted the Ordinance of 1787.

³⁰⁸ *The Fathers of the Constitution*, 56.

³⁰⁹ That is, of agreeing to enlarge it by the addition of new states.

Considering that frontier policy had been more or less of a local problem in every colony throughout its existence, it might seem that when they jointly assumed responsibility for its solution in federal territory wisdom was to be anticipated.³¹⁰ Their views of what policy was best could no longer be warped by any direct economic interest in the territory (as it was in regard to their own backlands), nor by exclusive political advantages given by its ownership. Under such circumstances the influence of Revolutionary liberalism would supposedly have been powerful. In fact there is no evidence whatever of its existence.

Two groups of exceptional men—in considerable part identical, all of the same economic and social stratum, all of large political experience—formulated simultaneously the Constitution and the Ordinance. To the problems of new states, and therefore necessarily in some degree to the general problems of the West, the Federal Convention gave long and strained attention. With reversed apportionment of interest the same was true of the Congress. *So far as an observance of the principle of equality was ineluctable* in performance of their respective tasks their work was successful. That was true of the primary task of each body:—of the Convention's in creating a federal system of equal states, with equality of all in relation to the federal union, and with equal rights in all states of the citizens of each;—of the Congress, in giving equality to all citizens of the Territory, and to the citizens of all states while in the Territory, under its government, courts, and law.

But the status of a territory, as such, was something new. It had never been a thing apart from the individual colonies before, and now was; the treatment of the backlands in the colonies had never been based on principles of equality. It had for years been assumed that the territory should be outside the Confederation until organized piecemeal into states for admission thereto; naturally, it would seem, its status under the Constitution was left unchanged, with

³¹⁰ Professor McLaughlin suggested that "From the beginning of colonial history, the frontier policy had been for each colony a matter of difficulty, and it was not so easy as it might now seem to cast aside traditions and at once transfer the whole—policy, hopes, plans, government, and lands—into the hands of a central authority as yet untried and indeed unformed"—*A Constitutional History of the United States* (1936), 122. Having imposed upon themselves in common a problem known to each to be one of great difficulty, their solution of it as a federal problem is interesting.

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the provision that Congress "may" admit new states. The power was immense, despotic, and could be dangerous, as the Hartford Convention recognized. Under the balancing of slave- and free-state admissions it dominated our national politics for decades. The powers of the old Congress, under the compact between the Confederation and Virginia, to set up territorial government had also been almost unqualified.³¹¹ Under the Constitution the problems of government were evaded by empowering Congress to "make all needful rules and regulations respecting it"; those loose phrases being deliberately chosen by Gouverneur Morris to permit of *permanent* dependencies governed *imperially*. And the old Congress furnished, as a sample of proper legislation, the Ordinance, which the new Congress re-enacted without substantive change.

In short no originality, no trace of the influence of Revolutionary idealism, appears in the treatment of the territorial problem. Colonial-mindedness prevailed. The field in which political maladministration had been most marked in the colonial period—unequal representation in the legislature—no longer existed; each territory, following the Ordinance model, would have only one nonvoting representative in Congress, regardless of its age or population. Lesser and varying contradictions of democracy were thus avoided by including them in one initial contradiction that was grosser. The Ordinance provided that the territorial inhabitants should be "subject to pay a part of the federal debts contracted or to be contracted, and a proportional part of the expenses of Government, to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other States." But those are only the words of Congress; nothing in the Constitution as thus far constructed by the Supreme Court has required equality. And even had "equality" of taxation been guaranteed—what of our Revolutionary slogan?

³¹¹ With reference to the power to admit new states, Nathan Dane, in his letter of 1830 to Webster, commenting upon Hayne's criticisms of the Hartford Convention, said: "had Mr. Hayne thought a little more of Congress's exercise of *unlimited* power to make new States at pleasure on any purchased territory, he never would, I believe, have reproached the Convention for proposing to restrain such *unlimited*, tremendous power"—Mass. Hist. Soc. *Proceedings*, 1867-1869: 480.

On the power to govern under the amended Articles, *ante* xci-ii; on both powers under the Constitution, cxxv-xxx.

One must sometimes wonder how many of those who have written about the Ordinance had actually read it. Some have even queried whether its plan of government could possibly have been bettered, and many others, in their extravagant praise of its excellencies, have seemingly assumed that it could not.

It would have been very easy to have given the territories a qualified place in the federal system—or at least a closer relation to it, particularly with full representation. It would have been very easy to have made the action of Congress in the territories subject, as respects rights of persons and property therein, to whatever restraints should be imposed upon its action within the area of the states united under the Constitution. When such immense improvements can so easily be mentioned, it is unnecessary to recount numerous lesser ones.

To be sure, the grievances of border settlers in the individual states were not in general reproduced in the federal territories. Because of the differences in form of government some *could not* be. And because the disorderly qualities assumed to be permanent in territorial society were soon recognized as only transiently characteristic of its first stages of settlement, and the inhabitants proved to be dependably nationalistic, the timorous and prejudiced attitude of the Ordinance's framers did not long continue dominant in Congress. To be sure, also, Congress observed its legislative guaranties of personal liberty. To those who think that there is no real choice between governments—"whate'er is best administered, is best"³¹²—these facts mean that the Ordinance's was as good a government as any.³¹² But these facts were so *despite* the form of government. They were so because of the steadiness of Anglo-American traditions of government and personal freedom.

Moreover, government did not proceed smoothly under the Ordi-

³¹² Milo M. Quaife has written for pupils in the public schools: "one would hesitate to affirm that any other form of government that could have been devised would have operated better . . . it would be difficult to prove that anyone today, endowed with all the knowledge of the actual course of development which the century and a half since 1787 has witnessed, would be able to draft a better one"—Ill. Hist. Soc. *Journal*, 30: 422-23. It is unfair to exclude all who would try by requiring such impossible qualifications; and besides, since no other system can be *tried*, could Dr. Quaife be persuaded that anything *would* have worked better? Professor Pease, on another "patriotic" occasion, took much the same position—T. C. Pease, "The Ordinance of 1787," *Miss. Val. Hist. Rev.* 25: 172.

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nance. Official bickerings (particularly during the stage of nonrepresentative government), and loud complaints from territorial inhabitants against some of its injustices, disturbed territorial affairs throughout the existence of the system. This constant unrest was a reality, not to be overlooked because of an assurance that *ultimately*—when a balance of free- against slave-state admissions or (later) of power between political parties should permit—escape from it could be had in statehood.³¹³ And this is wholly apart from the role played by party politics in the actual administration of the system, the abuses of which—as already pointed out³¹⁴—were inherent in the system's centralization.

V

The authorship of the Ordinance was the subject half a century ago of a controversy which the merits of the enactment scarcely justified.³¹⁵ It arose from the fame of the Ordinance's "compact" articles, and was supposedly justified by their importance, although their mere legislative character had been made clear by the Supreme Court long before the controversy started. Any review of this controversy re-

³¹³ Dr. Quaife (like some others) seems to feel that this anodyne should have quieted the discontented. Indeed, he has gone so far as to assert that there were grievances and still were none, and sustains the latter position with a novel reason. "The territorial period for each" of the states of the Old Northwest, he says, "was marked by political discord, and numerous complaints were made against the rulers the President placed over the territories. Many of these complaints were in fact well founded." But nevertheless, since it was agreed that the territories were ultimately to be organized into equal states of the federal Union, "This program *for the government of America's own colonial domain* eliminated at a single stroke the *grievance* which had driven the older colonies into rebellion against their king and country. For their complaint, at bottom, had been that they were regarded as politically inferior to their countrymen at home, *subject to be governed forever by the latter*, without regard to their own views or desires"—III. Hist. Soc. *Journal*, 30: 422, 419-20; italics added. Now, possibly the colonies would have forgotten all grievances elaborated in the Declaration of the Causes and Necessity of Taking up Arms (July 6, 1775—*Jour. Cont. Cong.* 2: 140-57) had they been promised ultimate incorporation into the Empire as equals of Great Britain; they said nothing of that, but it is an idea to contemplate. At any rate Dr. Quaife tells the school children that that grievance being absent in the case of our colonies, they had—seemingly—really no grievances.

³¹⁴ *Ante* at notecall 197.

³¹⁵ It began with the two articles of Dr. Poole referred to *ante* n. 3. There are discussions of the question in Dunn, *Indiana*, 204-10; C. R. King, *Rufus King*, ch. 15; Hinsdale, *Old Northwest*, 273-78; the last discussion by Dr. Poole is in Amer. Hist. Assoc. *Papers*, 3: 287-94; Dane's discussions are cited *post* n. 322.

veals the uncritical character of considerable historical writing—not wholly confined to that of two generations ago.

With the slow acceptance of truth regarding the nature of the compact articles there has also come a realization that there was little possibility of individual authorship, in the usual sense of that word, in the case of a legislative enactment. It was produced by a committee. Though the original appointment of this was by motion of Nathan Dane, he was not made a member of it until four months later, was never its chairman, and did not report it in final form to Congress. It was, as Dane himself stated, reported by Edward Carrington, who was chairman of the committee—though only, as Dane also said, *pro forma*.³¹⁶ It was entirely in Dane's writing,³¹⁷ and unquestionably presented the views of a majority, headed by Dane, to some of which views Carrington was unsympathetic.³¹⁸ Ten men participated in the committee's work; we know minor contributions made by some of them, and other members were of such ability and force as to preclude an assumption that they contributed nothing.³¹⁹ In the second place, the completion of the instrument was plainly due to a conjunction of the interests of several groups of influential citizens, and although the compromises required to unite these interests affected more particularly the ordinance for sale of the land they also somewhat affected the Ordinance in which we are here interested. The sources fully support Richard Henry Lee's description of the Ordinance "as a measure preparatory to the sale of lands."³²⁰

³¹⁶ "Col. Carrington, of Virginia, as chairman, of the committee *pro forma*, reported the ordinance, but formed no part of it." Dane, *Abridgment*, 9 (app.): 75. See *post* n. 377.

³¹⁷ *Jour. Cont. Cong.* 32: 314 n. 1. In 1820 this manuscript draft could not be found, but Dane's manuscript draft of the slavery article was then attached to the draft printed after the first reading of July 11, exactly as it is attached today—Dane's letter to Webster, March 26, 1830, in *Mass. Hist. Soc. Proceedings*, 1867-1869: at 478. Compare *post* n. 338.

³¹⁸ See Dane's letter quoted *ante* n. 247.

³¹⁹ The members appointed on March 27, 1786 were James Monroe, William Samuel Johnson, Rufus King, John Kean, Charles Pinckney—*Jour. Cont. Cong.* 30: 139. They reported on May 10 and again on July 13—*ibid.* 251, 255, 402-6. Johnson, Pinckney, Melancton Smith, Nathan Dane, and William Henry reported on Sept. 19—*ibid.* 31: 669-73; Dane had been appointed on July 19—*ibid.* 30: 418 n. 1—but retired from the committee on Aug. 7—*ibid.* 31: 502 n. 1. On July 9, 1787 recommitment was made to Edward Carrington, Dane, Richard Henry Lee, Kean, and Smith—*ibid.* 32: 310. See *post* n. 332.

³²⁰ He so described it in a letter of July 15, 1787 to Washington with which a copy of the enactment was enclosed. He continued: "Our next

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There were members of the Ohio Company of Associates and the Scioto Company who were interested in western colonization merely for financial gain and others interested in it as an aid to veterans of the Revolutionary War. There were members of Congress whose support of the Ohio Company's proposed purchase would have been stronger because of the probability that this would insure the exclusion of slavery in the plan for local government. Others looked with particular interest upon the plans of the Company because the New England background and desirable character of its original members promised a frontier society of sobriety and stability that would be conducive to the safety of the western states and border of the Confederation. Still others welcomed a large and compact area of settlement, particularly by citizens of industrious and dependable habits, because it held out the hope of future income for the payment of the federal war debt. And lastly, the ambition of Arthur St. Clair, president of Congress, to be governor of the new territory, and his personal popularity, seem to have entered into the joint effect of these various influences.³²¹

It is manifest that all this would have restricted free action by any one member of the committee; and, since Dane wrote the report, these circumstances might indicate that his contribution could have been no more than the secretarial functions of recording resolutions, sensing compromises, and choosing phrases that satisfactorily covered them. Some have therefore referred to him as the committee's "scribe." But though the differences in interest just mentioned would have affected the relative satisfaction with which men voted for different provisions of the Ordinance, the actual evidence reveals

object, is to consider of a proposition made for the purchase of 5 or 6 millions of Acres, in order to lessen the domestic debt"—Burnett, *Letters*, 8: 620. Dr. Poole wrote: "it was drafted as a part of the scheme devised by the Ohio Company . . . for buying and settling . . . land in Ohio"—Amer. Hist. Assoc. *Papers*, 3: 287. Its preparation, that is the revision of Jefferson's ordinance from which it resulted, was begun in 1785, and was not "a part of the scheme" of the Ohio Company (which was organized in March 1786 but was essentially an offspring of the petitions from officers of the army in 1782-1783); however, it did accord with the Company's plans, as pointed out below, cccclxix.

³²¹ It is not meant that these were distinct groups which bargained as entities, but that the special interests of all were involved. Herbert Adams was perhaps first to emphasize this multiplicity of converging interests (actually less important, it would seem, than has been imagined)—book review cited *ante* n. 1. President Hinsdale later did the same—*Old Northwest* (1888), 269, and in W. P. Cutler, *Manasseh Cutler* (1888), it was recognized as the basis on which Dr. Cutler relied for a realization of his plans—1: 121.

only one of these interests (that of the Scioto speculators) as involved in negotiations that directly affected its contents. If, then, Dane was dominant in a committee majority thoroughly agreed upon the plan of temporary government (which alone had been drafted in any form up to July 9—he concededly adding everything else), and was given a free hand in redrafting that, he might very well have been the author of the enactment in the sense of freely selecting, phrasing, and combining its content. And that appears to have been precisely the situation.

His claims throughout his life to authorship of the Ordinance in any sense³²² were confined to authorship in the sense of responsible

³²² First, in a letter of July 16, 1787 to Rufus King—see C. R. King, *Rufus King*, 1: 289—also printed in W. P. Cutler, *Manasseh Cutler*, 2: 372; and in Burnett, *Letters*, 8: 621; again in his *Abridgment*, 7: 442-50 and 9 (app. 1830): 74-76; in his letter of March 26, 1830 to Mr. Webster—Mass. Hist. Soc. *Proceedings*, 1867-1869: at 475; and finally in a letter of May 12, 1831 sent to J. H. Farnham, for the Indiana Historical Society, which was first published in the New York *Tribune* of June 18, 1875 and later (from the original) in the Ind. Hist. Soc. *Publications*, 1: 69-71.

In the above letter to Webster he wrote: "I have never claimed *originality* except in regard to the clause against impairing contracts, and perhaps the *Indian* article"—Mass. Hist. Soc. *Proceedings*, 1867-1869: at 479; meaning the portion of the 3d compact article which refers to the Indians. The following quotation explains the substance of his claims. "The sixth article of compact, the slave article, is imperfectly understood—Its history is—in 1784 a committee, consisting of Mr. Jefferson, Mr. Chase, and Mr. Howell, reported it, as a part of the plan of 1784. This Congress struck out. . . . It was imperfect, First, as it admitted slavery until 1800. Second, it admitted slavery in very considerable parts of the territory forever. . . . [See *post* n. 346.]

"The amended slave article, as it is in the ordinance of '87 was added on the author's motion as the journals show—[and] was not reported [from the committee. See *post* n. 338]. . . .

"On the whole, if there be any praise or any blame in this ordinance; especially in the titles to property and in the *permanent* parts;"—that is, the compact articles—"so the most important, it belongs to Massachusetts; as one of her members formed it and furnished the matter with the exceptions, following. First, He was assisted in the committee of '86 in the *temporary* organization; almost solely by Mr. C. Pinckney, who did so little he felt himself at liberty to condemn this ordinance in that debate [namely of 1820, on Missouri; see *post* n. 360]. Secondly, the author took from Mr. Jefferson's resolve of '84 in substance the . . . six provisions in the fourth article of compact. . . . Thirdly, he took the words of the slave article from Mr. King's motion made in 1785 [see *ante* ccxxxi-iv; *post* n. 346], and extended its operation, as to time, and extent of territory, as is above mentioned—as to matter his invention furnished the provisions respecting imposing [impairing] contracts and the Indian security, and some other smaller matters, the residue, no doubt, he selected from existing laws, &c."—Dane, *Abridgment*, 9 (app. 1830): 75-76.

Dr. Poole depreciated Dane's claims, as due to old age, failing memory, delay until his contemporaries of 1787 were all dead—Amer. Hist. Assoc.

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draftsmanship. As he said, he "drew" it; and as a Massachusetts lawyer he employed in various cases the language of her laws or constitution. He stated his claims modestly and discriminatingly. He was certainly not merely, as Dr. Poole and George Bancroft depreciatively called him, "the scribe" of the committee.³²³ As an able lawyer, with large legislative experience, his contributions in committee discussion would presumably have been at least equal to those of any of his colleagues. His fitness for such work (for several years he had been engaged in revising the statutes of Massachusetts) should have been greater than that of any of them, unless possibly Dr. Johnson.³²⁴

Papers, 3: 288, 293. In fact his claims throughout life were modest, fell within his demonstrably original contributions, and his writings up to 1831 (*aet.* 79) reveal no mental weakness.

³²³ Bancroft, in the last revision (1883-1885) of his *History*, 6 (1896 repr.): 287, 290; by Dr. Poole in 1888, presumably following Bancroft, in his presidential address before the American Historical Association—see its *Papers*, 3: 287.

³²⁴ He mentioned his early work in statutory revision in his letter to Webster: "one who, in '87, had been engaged several years in revising her laws . . . some statutes revised on subjects of importance, from 1782 to 1801"—Mass Hist. Soc. *Proceedings*, 1867-1869: 479; see Judge Story in *No. Amer. Rev.* 23 (1826): 40, 41. *Nota bene*. Dane was not free to alter what had been shaped by the committee.

In addition to talents and experience, he had already begun his comparative study of the law of the different states, the results of which were ultimately embodied in his *Abridgment*—Justice Story, review of Dane's *Abridgment* (*ante* n. 35) in *No. Amer. Rev.* 23 (1826): 14. He served in the lower house of the Massachusetts legislature, 1782-1785, before going to the Continental Congress, 1785-1787. He later served in the Massachusetts Senate, 1790; 1793-1798; in 1795 was commissioned to revise the laws of the Commonwealth, and in 1812 was one of the commissioners to revise and publish its laws of the colonial and provincial periods. See DAB, *s.v.* "Dane, Nathan." His biographer in that work correctly characterizes his *Abridgment* as "the first comprehensive compendium of law" published in this country; and it is believed that he is justified in describing it as "displaying not only his great legal attainments but a meticulous attention to detail and a methodical labor which was characteristic of everything which he undertook." Dane gave a building to the Harvard Law School and endowed a professorship in it—see Charles Warren, *History of the Harvard Law School*, 1 (1908): 416 *seq.* and 468 *seq.* The professorship was established on the condition that his friend Justice Story should be its first occupant, and the latter, in dedicating to Dane his *Bailments*, characterized him as "distinguished alike . . . for talents, learnings, and fidelity in his profession, and for public labors." See also Charles Warren, *Hist. of the Harvard Law School*, 1: 413-16; Story's review of the *Abridgment* in *No. Amer. Rev.* 23 (1826): 21-33, 39-41. Story, in the dedication cited, praised Dane's "simplicity and dignity." President Quincy (Warren, 1: 414) characterized him as "calm, even, and serene." His biographer (DAB) states that "his outstanding characteristics were industry, directness and simplicity. . . . He possessed a singularly well-balanced judgment, a great forethought, and was totally devoid of temperament." Dr. G. B. Loring undoubtedly expressed

Let us turn to the last days of the Ordinance's legislative history. The Ohio Company had prepared a plan to purchase a million and a half acres beyond the Ohio. Dr. Manasseh Cutler was made its agent to conclude a contract with Congress, and in his diary he refers to consultations with Rufus Putnam and Samuel Holden Parsons as having "settled the principles on which I am to contract . . . for lands," "all our matters with respect to our business with Congress."³²⁵ The reworking of Jefferson's ordinance had been more than fifteen months in progress when Dr. Cutler reached New York on July 5, 1787. As respects the system of governmental administration established by the Ordinance of 1787 (as distinguished from the basic principles of government enunciated in the compact articles), the draft already before Congress was in substance what the Ordinance in final form provided. Otherwise the two were totally different. Up to July 5 the draft contained none of the six "compact" articles—and little of the other matter, not dealing strictly with governmental provisions, which it ultimately contained. In eight days the enactment had been completed, vastly changed, and unanimously passed. Unquestionably this rapid progress reflected the enormous influence of the Ohio Company's project, involving the convergence of the several influences above indicated. But a memorial of the Company had been two months before Congress. The progress suddenly made after Dr. Cutler replaced General Parsons as the Company's agent was presumably due to the former's genius for persuasion and compromise.³²⁶

But what do the above-recited facts indicate regarding any specific influence exerted by Dr. Cutler upon either the form or the content

Massachusetts traditions in describing him (*Amer. Hist. Assoc. Papers*, 3: 307) as "a calm, conservative, dispassionate, able, and accomplished lawyer." Particularly interesting to one who observes his committee work in Congress is another characterization by Judge John Lowell, who preceded him in Congress: "a man of great firmness, approaching to obstinacy, singular, impracticable. . . . Honestly, however, inclined"—Warren, *op. cit.* 413.

³²⁵ W. P. Cutler, *Manasseh Cutler*, 1: 204, 205.

³²⁶ A petition by Parsons to Congress, presented on May 9, had reawakened interest in plans for government of the western country. See *post* n. 331. Dr. Cutler expressed (May 30) absolute disagreement with Parsons as regarded location of the purchase—*ibid.* 1: 296-97. This was the cause of his being superseded by Cutler as the Ohio Company's spokesman before Congress—see Hulbert, *Records of the Original Proceedings of the Ohio Company*, 1: liii-lv. The essential documents on the land purchase are in Carter, *Territorial Papers*, 2: 29, 52-56, 61-64, 80. Parsons' original detailed proposals are in Hulbert, *op. cit.* li-iii.

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of the Ordinance? The "principles" on which it was agreed with General Putnam, he should "contract . . . for lands," and the "matters" involved in his "business with Congress" on which he and General Parsons agreed, were presumably identical, and likewise presumably business matters; such as the location and survey of land, and the price and manner of payment.³²⁷ Could they have included anything other than such matters of ordinary business?—perhaps stipulations respecting a governmental plan for the Territory, or even such matters as slavery?

In view of the antecedents of the Ohio Company it may be surmised that if an unsatisfactory governmental plan had not been in prospect difficulties might have arisen in the Company's negotiations with Congress. Dr. Poole said that "The purchase *would* not have been made without the Ordinance, and the Ordinance *could* not have been enacted except as an essential condition of the purchase." If there is doubt about this neat summary it concerns the second rather than the first proposition. Mr. Hinsdale took it to mean that the New Englanders would not have bought the land unless assured of "a satisfactory government."³²⁸ Of that there can be little doubt. But a conservative plan for stable government had long been in prospect, and though we may assume that Dr. Cutler took great satisfaction in it, there is no evidence that it gave him any anxiety.

Is it reasonable, then, to suppose that the "principles" on which he was to act in contracting for land included stipulations respecting slavery?—or respecting other matters falling under English traditions of freedom and liberal government that were not in the draft of the Ordinance when Dr. Cutler arrived in New York? It has been assumed that they did, and on the basis of this *assumption* extravagant claims have been made for him as respects authorship of the Ordinance,³²⁹ although he never made any, himself, beyond a refer-

³²⁷ I find that Frederick D. Stone long ago took the same view as the writer on this (and on various other points)—"The Ordinance of 1787" (1889), *Pennsylvania Magazine of History and Biography*, 13: 309, 323.

³²⁸ Hinsdale, *Old Northwest*, 276.

³²⁹ By Dr. Poole, who wrote: "In view of its sagacity and foresight, its adaptation for the purpose it was to accomplish,"—which characterizations the writer considers only empty rhetoric—"and the rapidity with which it was carried through Congress, the most reasonable explanation . . . of the origin of the Ordinance is, that it was brought . . . by Dr. Cutler, with its principles and main features developed; that it was laid before the land committee . . . on July 9th, as a *sine qua non* in the proposed land pur-

ence to "several amendments" suggested by him and adopted.³³⁰

Dr. Cutler's business, as the records show, was not at all with the committee engaged with the preparation of the governmental Ordinance. When, on July 6, he "presented" his petition it was obviously presented to the land committee, appointed two months earlier to report upon the proposal made by the Ohio Company through General Parsons, then their agent.³³¹ From that day onward intensive consideration of the governmental plan and of the Company's projected purchase had necessarily proceeded simultaneously, and on July 9, the day that Cutler began his actual negotiations, the interdependence of the proposed purchase of territory and the necessity of organized government thereover was recognized in the reorganization of the committee in charge of the governmental plan, its new membership being made in part identical with that of the land committee.³³² Moreover, as the latter committee seemingly did not

chase; and that the only work of the Ordinance Committee was to put it in a form suitable for enactment. The original draft may have been made . . . by Rufus Putnam, Manasseh Cutler, or Samuel Holden Parsons; but, more likely, was their joint production"—*Amer. Hist. Assoc. Papers*, 3: 293. The formulation of the governmental plan has already been traced in the proceedings of Congress; the derivation of almost all the other matter in the Ordinance can be suggested with considerable confidence; were that not possible, there is no reason whatever to doubt the accuracy of Dane's own claims. Hardly any of Dr. Poole's surmises had any evidential or even logical basis. None of the three men he named seems ever to have made any claim to have shared in the drafting of the Ordinance, beyond the vague and modest statement of Dr. Cutler quoted in the text.

³³⁰ W. P. Cutler, *Manasseh Cutler*, 1: 242, 293. The only one identified related to taxation before representation; so he did influence (though he conceded the desirable modification of his proposal) that very important portion of territorial government—see *post* at notecall 358.

³³¹ His memorial, of May 8, was presented on May 9 to Congress, and referred to a committee consisting of Edward Carrington, Rufus King, Nathan Dane, James Madison, and Egbert Benson—*Jour. Cont. Cong.* 32: 276. The *Journal* shows no petition from Cutler to Congress; he merely replaced Parsons as agent with new terms and conditions of contract—W. P. Cutler, *Manasseh Cutler*, 1: 230. This is very clear from the documents cited *ante* n. 326. Later, unwilling to assume certain responsibilities alone, he joined Winthrop Sargent with him in closing the final agreement—*ibid.* 299 and *Jour. Cont. Cong.* 33: 427-29.

³³² There was no quorum in Congress from May 14 to July 4. The committee to which the Parsons memorial was referred was the *land committee*, and it reported on July 10—*ibid.* 32: 311-13. On the very day that the Parsons memorial was presented, a report by a committee (William Samuel Johnson, Charles Pinckney, Melancton Smith, Nathan Dane, and William Henry—*ibid.* 242) charged with the drafting of a governmental plan had been debated and ordered to a third reading on the next day, May 10—*ibid.* 275. The Ohio project necessarily delayed matters. The debate was had on May 10 and another on July 9—a draft in *ibid.* 281-83 shows the result of

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thereafter have a quorum for business, it is possible that the influence of members of the other committee was increased. Nevertheless it was the land committee ("the committee" as he invariably called it) upon which he attended, with which he debated and negotiated, and through which he ultimately secured from Congress a contract on precisely his own terms.³³³

His diary indicated no relations with the committee in charge of drafting the governmental plan beyond an invitation to read the bill, with liberty to suggest amendments. *His reference to the matter was most casual.* "As Congress," he wrote in his diary for July 10, five days after his arrival, "was now engaged in settling the form of government for the Federal Territory, for which a bill had been prepared, and a copy *sent* to me, with leave to make remarks and propose amendments, and . . . I had taken the *liberty* to remark upon [it], and to propose several amendments, I thought this *the most favorable opportunity* to go on to Philadelphia."³³⁴ Had Dr. Cutler been attending the meetings of the committee working on a plan of government, and arguing with its members changes in *that* plan as a condition of purchase, as he was with the other committee, no one need have "sent"

each. After this second debate the plan was recommitted. This new committee *on the Ordinance* consisted of Carrington, Dane, Richard Henry Lee, J. Kean, and Melancton Smith—*ibid.* 310 n. 3. Thus, as stated in the text, the membership of the two committees was in part identical, and for a further reason later stated in the text this was of practical importance.

³³³ The distinction is of course one of form. If in fact the parties were at first, as he recorded in his diary, so far apart that there appeared "little prospect of closing a contract," it was an impressive exhibition of skill by which he gained his ends. His alliance with the Scioto speculators, by means of which he obtained for the Ohio Company the favorable terms of its contract, was harshly criticized. His defense is given in a long letter of Nov. 19, 1788 to the Company's directors—Western Reserve Hist. Soc. *Tract* No. 97 (1917), 119-33; he is also elaborately defended by Mr. Hulbert—*Records of the Original Proceedings of the Ohio Company*, 1: l-iv. There seems to be no real evidence that the states with large backlands for sale lacked friendliness to the Ordinance—see *ante* nn. 47, 239. Suspicion of its influence was reported by Madison to Washington, April 16, 1787; Burnett, *Letters*, 8: 579. Dr. Cutler found it expedient at one time to feign indifference to a contract with Congress, even talked of turning to the states—W. P. Cutler, *Manasseh Cutler*, 1: 296—but only for a "desired effect." Dr. Poole used these old suspicions (quoting Putnam's of 1784) as a basis for asserting as a fact that "as a Massachusetts man he [Dane] was not in sympathy with the scheme of Western settlement. . . . The directors expected nothing from the Massachusetts delegation, and worked independently of them"—Amer. Hist. Assoc. *Papers*, 3: 288. What about New York?—compare Cutler, *Manasseh Cutler*, 1: n. on 303-4.

³³⁴ W. P. Cutler, *Manasseh Cutler*, 1: 242.

him the bill; he would have taken no "liberty" in commenting upon it.

If in fact any provisions in that plan were made by the Ohio Company a prerequisite to its purchase of land, it seems highly probable that they would have included a prohibition of slavery, for the Ohio Company grew out of the plan formed by officers of the Army in 1783 to establish a new state westward of the Ohio, and in that plan, among provisions described by Timothy Pickering as "generally approved of," "the total exclusion of slavery" was to be made "an essential and irrevocable part of the Constitution" of the state contemplated.³³⁵

Now, the draft of the Ordinance as ordered printed on May 9 for a third reading on May 10 (which reading did not result in its adoption, because of the presentation to Congress on the ninth of General Parsons' memorial on behalf of the Ohio Company), contained *no* provision on slavery. The Parsons memorial *also* contained no word on slavery, and the draft remained without such as amended in debates of May 10 and July 10, on which latter day Dr. Cutler examined "the bill" and suggested amendments to it.³³⁶ So far as

³³⁵ O. Pickering, *Life of Timothy Pickering*, 1: 546; W. P. Cutler, *op. cit.* 1: 149, 158.

³³⁶ It seems almost certain that what Dr. Cutler received was the print of May 9 with amendments made in the debates of May 10 and July 9, after which it was recommitted. Its content at that moment is shown in *Jour. Cont. Cong.* 32: 281-83; see *ante* ccxxxiv-v. The new committee, because appointed to deal with the situation created by Dr. Cutler's arrival, would very properly have shown him the courtesy of asking for his suggestions of further amendments. Cutler made suggestions on July 10 and left that evening for Philadelphia—W. P. Cutler, *Manasseh Cutler*, 1: 242. He returned on July 17—*ibid.* 290.

A visitor in 1847 at Dr. Cutler's home (he died in 1823) saw "the Ordinance of 1787 on a printed sheet," with a marginal notation that Dane requested Dr. Cutler to suggest amendments, and that at his instance "was inserted what relates to religion, education, and slavery"—*ibid.* 343. Note that this printed "Ordinance of 1787" *could not* have been the printed draft Dr. Cutler saw; that the narration in the third person left unrevealed the person in which the actual notation was written; that there was no statement as to that, nor as to the handwriting, the time of writing, or by whom written—although the paper was shown by Dr. Cutler's son. Again, another son, who visited Dr. Cutler in the winter of 1804-1805, left behind him at death a written statement that his father told him he was responsible for the slavery article of the Ordinance—*ibid.* 343-44. As against the absence of any claim in the contemporary diary, this second statement is poor evidence. Very few writers have given any attention to either statement. In the opinion of the present writer they should be wholly disregarded. Mr. Barrett pointed out that there is no evidence of Dr. Cutler's ardent opposition to slavery; that in this same session of Congress he voted against a bill to begin in 1805 the gradual emancipation of slaves in the District of

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regards the Company, its records show that it made no demands regarding slavery.³³⁷ If any of its leading members were resolved personally to seek assurances on the subject, it would seem likely that their efforts would have made at the beginning, through General Parsons (whose letters show no trace of such matters) rather than wait for action by Dr. Cutler. But it becomes incredible that there could have been any suggestion by either man to the committee of Congress—or, therefore, any personal agreement by members of the Company to seek a declaration by Congress—when one finds a similar complete absence of any reference to slavery in Dr. Cutler's rather full diary of his dealings with Congress. And, anyway, *assuming* he had done nothing more than suggest on July 10 an amendment in the form of an antislavery declaration, would he have not stayed in New York to enlist support for it? Would he have left for Philadelphia on the tenth, deeming that "the most favorable opportunity" to be absent for a week? Certainly not if he was one-tenth the humanitarian his admirers would have him be.

As a matter of fact no amendment was made. No report by the committee to Congress ever included a declaration on slavery. It was moved by Dane as an individual in debate, after the second reading.³³⁸ It has been said that Dr. Cutler could leave, and did, in

Columbia—*Evolution of the Ordinance of 1787*, 76.

There is no reason to assume that Dane indicated to Dr. Cutler the probable content of a report not yet drafted; they were not on confidential terms—*post* n. 341. There is no reason to assume that Dr. Cutler asked for important amendments which he did not deem worthy of mention in his diary; for consider the trivia he did record. But Mr. Dunn and others have suggested that he did make such suggestions—*ante* n. 329, *post* nn. 345, 364, 366. Even Mr. Barrett (and I suppose that means with the approval of Professor Howard) leaned in this direction in his thesis—*Evolution of the Ordinance of 1787*, 71-72; but compare his initial "if" and "it is likely" with his "no doubt" a few lines farther on.

³³⁷ A. B. Hulbert, *Records of the Original Proceedings of the Ohio Company*. Mr. Hulbert remarks (he discusses none of these problems of authorship), "There is but a single mention of the Ordinance of 1787 in the entire records of the Ohio Company from 1787 to 1796"—*ibid.* 1: xcv. Its entire attention was on the purchase of land—xcvi. In the face of all evidence one reads in Dr. Cutler's biography: "His first effort was to attend to the organic law"—W. P. Cutler, *Manasseh Cutler*. 1: 342.

³³⁸ The official committee report of June 11 shows nothing—*Jour. Cont. Cong.* 32: 320 *seq.* Dane wrote years later, but correctly: "The . . . slave article as it is in the ordinance of '87, was added on the author's motion, and, as the journals show, was not reported from the committee"—Dane, *Abridgment*, 9 (app.): 75. When was it added? As the records now stand, there are both a manuscript and a printed copy of the report of July 11. The printed copy has on it manuscript alterations by Charles Thomson

perfect peace of mind, "for he had in his pocket the draft of the Ordinance which was to be reported to Congress next day," and "confident that it would contain"—though it did not—"the article prohibiting slavery," which had been "obviously agreed upon in com-

and Grayson, and has *attached* to it Dane's manuscript copy of the slavery declaration. It is stated that "*the corrected printed form* represents the second reading on July 12"—*Jour. Cont. Cong.* 32: 314 n. 1 (italics added); that is, obviously, without the attached slavery article. Dane tells us that this was moved by him, and adopted, "after we had completed the other parts"—letter of July 16, 1787 to King, Burnett, *Letters*, 8: 621. The attachment of the article to the bill as it stood after the first reading (unaltered since at least 1820—*ante* n. 317) suggests that it was to be moved in debate after the second reading on July 12; and as Peter Force so stated the fact in 1847 when he may have had additional evidence for its accuracy—W. H. Smith, *St. Clair Papers*, 2: 611, 612—it may well be so taken.

Dr. Cutler recorded no criticism of Dane's actions, but after the happy outcome criticism would have had little point. Dane's postponement of his motion was probably wise, and his explanation reasonable. "When I drew the ordinance . . . I had no idea the States would agree to the sixth article . . . as only Massachusetts of the Eastern States was present,"—this was true of New England states from July 6 to July 13—"and therefore omitted it in the draft; but finding the House favorably disposed on this subject, after we had completed the other parts, I moved the article, which was agreed to without opposition"—letter of July 16, Burnett, *Letters*, 8: 622. "When the ordinance was . . . under consideration, from what I heard, I concluded that a slave article might be adopted, and I moved the article as it is in the ordinance. It was added, and unanimously agreed to, I thought to the great honor of the slave-holding states"—letter of July 16, 1787 to King, in Burnett, *Letters*, 8: 622. The slavery article is further discussed by Dane—its form, its actual source as used, and Dane's responsibility for it—in his letter to Webster of 1830—*Mass. Hist. Soc. Proceedings*, 1867-1869: at 477-78; and in his *Abridgment*, 7: 443, 446 and 9: 75.

Dr. Poole assumed a committee agreement on the clause before July 11, its omission by Dane in the report of that day (though he made no report), and its "restoration" on July 12—*Amer. Hist. Assoc. Papers*, 3: 290, 293. He therefore wrote that Dane's failure to include the slavery compact in the bill of July 11 and July 12 showed "his lack of interest in the subject. It tends to confirm the suspicions of him which Dr. Cutler had expressed"—*Amer. Hist. Assoc. Papers*, 3: 293. Pickering and King, friends whose anti-slavery sentiment was very strong, seem always to have accepted Dane's good faith. The only "suspicion" voiced by Dr. Cutler regarding Dane was of July 19, *with respect to the land contract*—W. P. Cutler, *Manasseh Cutler*, 1: 294—"Dane must be carefully watched"; which only meant, in holding voters for the land contract, in which Congress finally agreed to Cutler's terms, with Dane's affirmative vote. McMaster gave primary credit to Grayson for the antislavery article—*History*, 1: 508. As respects its *adoption*, that is highly plausible. Hinsdale, following Bancroft, gives honor to R. H. Lee, Jefferson, King, Dane, and Grayson—*Old Northwest*, 273-74; which is quite correct, if naming the chief actors (Lee aside) for freedom in Congress, but omits honor to Timothy Pickering, whose two letters to King seemingly led to the King motion of March 16, 1785—see C. R. King, *Rufus King*, 1: 282-87. But all this—well known to Dane—has nothing to do with the question whether any other was more responsible than himself, or as much, for including the article in the Ordinance.

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mittee."³³⁹ These are only surmises, and even as such they seem to be wholly without basis. Cutler had met with the committee, the day after its appointment, on the morning of the tenth—almost certainly before the session of Congress.³⁴⁰ It made no such recommendations to Congress that day, and the debate of that day, as just above stated, left the plan without such provision. There is no scintilla of *evidence* that the committee had made decisions or had given Dr. Cutler any assurances.³⁴¹

It seems to be an inescapable conclusion that neither the Ohio Company nor Dr. Cutler was in any degree responsible for the anti-slavery clause. The latter's reference to the Ordinance after that clause had been incorporated into it was as casual as the above reference to it in its earlier form: "Called on members of Congress . . . Was furnished with the Ordinance establishing a government for the Western federal territory. *It is in a degree new modeled.* The amendments I proposed have all been made except one."³⁴² New modeled indeed! Dane had added between July 9 and 13 all the matter of the six compact articles with two very minor exceptions. Plainly, Dr. Cutler had seen nothing wrong in the absence of those matters from the draft he had examined on the tenth; had, in effect, approved their absence³⁴³—though many a layman north and south, such as Pickering and King and Grayson, would certainly have been more sensitive. But, Dane having inserted these matters, what a cold comment was Cutler's, considering that he was a minister of the gospel, upon provisions which purported (at least) to establish forever in the territory he was buying the traditional liberties of English

³³⁹ Poole, *Amer. Hist. Assoc. Papers*, 3: 292-93.

³⁴⁰ Compare his two sessions with it on July 9—W. P. Cutler, *Manasseh Cutler*, 1: 236, 237 (the first before, the second after, the appointment of the new Ordinance committee).

³⁴¹ If we may resort to surmises, it seems possible that the committee were unwilling to risk the rejection of the Ordinance and new difficulties in the land negotiation by inclusion of the slavery article. All voted for it, however. As for Dane's having communicated to Cutler his plans for the draft of July 11, that confidence seems unlikely. Though natives of the same county, and neighbors, they were evidently not friends nor even well known to each other—cf. W. P. Cutler, *Manasseh Cutler*, 194-95, 234. Their temperaments were very unlike, and it seems highly probable that they were uncongenial.

³⁴² W. P. Cutler, *Manasseh Cutler*, 1: 293—more than a full day after his return to New York.

³⁴³ Compare Dr. Burnett's remark—E. C. Burnett, *The Continental Congress*, 685.

subjects and to add liberty for Negroes!³⁴⁴ Having now considered the relations between Dr. Cutler and the Ordinance committee in a general way, and the antislavery declaration in particular, it remains to consider specifically the other parts of the Ordinance of 1787. If the Ohio Company or Dr. Cutler had no direct or formal connection, so far as any evidence exists to show it, with the antislavery clause, one certainly should not, *without* evidence, attribute to either credit for any other clauses, unless as confessedly pure speculation.³⁴⁵

It is of first importance to emphasize one point before proceeding further. Dane disclaimed "originality" save as regarded two important matters, and some minor ones. *But this meant originality in the idea*; that there was no copying in those cases from any source; as regarded, in particular, the clause against impairment of contracts and that bespeaking fair treatment of the Indians. In disclaiming originality in that sense as respects the rest of the Ordinance, he did not disclaim initiative in assembling and reforming those other portions. Some writers seem to have understood him in this second sense, and have offered with reckless abandon suggestions as to who might have suggested to him the inclusion of one or another matter. With few exceptions these suggestions are without support by either evidence or logic. It is essential to keep the evidence and the specu-

³⁴⁴ Compare Dane's lifelong pride in having inserted in the third compact a declaration intended to protect the Indians.

³⁴⁵ The thoughts of Mr. Winsor were almost as extreme as Mr. Poole's in behalf of Dr. Cutler. A month having passed after General Parsons presented his petition (*ante* n. 329), and Cutler being the new agent of the Company, he "now . . . showed that he was determined, if land was purchased, that a due recognition should be made in the pending ordinance of those social and political principles which had been formulated of late in the constitution of Massachusetts, and in the laws of the States which the new era had fashioned . . . on July 9, the ordinance was recommitted to see if it could not be modified to suit the demands for which Cutler stood. . . . the prospect seemed good of combining into a code of fundamental principles the numerous social and political ideas which were flying about. . . . particularly a demand for the extirpation of slavery north of the Ohio. Cutler was in his element in standing as the champion of freedom. . . . The other points upon which Cutler insisted were more easily carried. Such were reservations of land for the support of religion and education . . . the draft of the ordinance was submitted to Cutler for his scrutiny, and under his influence, doubtless, some other of the final social provisions of the instrument found their place in it. *With these amendments, it was reported back to Congress on July 11, and went promptly through successive readings*"—*Westward Movement*, 282-83; italics added. Thus, to sustain pure generosity Mr. Winsor wrecked the record facts.

lation distinct. Not, however, out of any special tenderness for Dane, who was himself—particularly in his attitude toward Jefferson³⁴⁶—notably hypercritical and ungenerous.

The content of the Ordinance may be described in various ways, but it may be well to follow Dane and describe it as consisting of a “temporary” and a (supposedly) “permanent” part. The first consists in turn of two distinct sections. It begins with provisions on “The titles to estates, real and personal, by deed, by will, and by descent; also personal, by delivery.”³⁴⁷ Some internal evidence would, of itself, strongly suggest Dane’s introduction of these provisions.³⁴⁸

³⁴⁶ In all his statements Dane necessarily recognized the claims of King and Jefferson—see his *Abridgment*, 9 (app.): 75 and letter to Webster in Mass. Hist. Soc. *Proceedings*, 1867-1869: 477-78. Nevertheless Dane did not do Jefferson full justice. He should have admitted that although the slavery provision in the ordinance of 1784 was less radical than that of 1787 in that it postponed the exclusion of slavery to 1800, it was more radical in that its exclusion applied to territory south, as well as territory north, of the Ohio. The truth is that, for the reasons just stated, Dane did not take his slavery article from Jefferson’s (*Jour. Cont. Cong.* 26: 277). Nor did he take it from King’s notwithstanding that they were alike in applying immediately and in being applicable to lands north of the Ohio alone (*ibid.* 28: 164). He took it from King subject to the addition of a fugitive-slave proviso—which was one of two restrictions imposed upon King’s by a committee to which it was referred (*ibid.* 239—the other being a postponement, as in the case of Jefferson’s, until 1800).

Again, if not disingenuous, Dane was certainly hypercritical of Jefferson in arguing that the latter’s ordinance would have left slavery “in very considerable parts of the territory forever” . . . especially in the parts owned for ages by French Canadian and other inhabitants.” True, Jefferson made no reference to them in any connection, and Dane did; but it will be seen below that his reference was *not* a prohibition of slavery, nor even a reference to it. After all, both men knew that the Illinois Country was part of Virginia and northwest of the Ohio, and would have been governed by the provision in Jefferson’s ordinance.

Dane’s capacity for prejudiced reasoning was also manifested in arguing up to the end of his life that the Ordinance—that is to say, a *statute*—was a northern production because most of the “compacts” in it came from the constitution and laws of Massachusetts, and he, a northerner, put them together—*Abridgment*, 9 (app.): 76. As a matter of literary construction this is true. But Dane was commenting on the Webster-Hayne debate as respected sectional credit for the *statute*; and Bancroft, and long before him Senator Benton, were manifestly correct in contending that the statute was *more* a southern than a northern measure—adopted, to be sure, by the votes of an equal number of northern and of southern states, but with four of the former and but one of the latter absent. Bancroft, *Formation of the Constitution*, (1882 ed.) 115, (1896 ed.) 289; *Register of Debates in Congress*, 6: pt. 1, pp. 60-62 (Jan. 2, 1830—Webster), 447-50 (May 21—Benton).

³⁴⁷ Dane’s description, copying which will facilitate a reader’s understanding of subsequent quotations.

³⁴⁸ Mr. Dunn, overlooking the early appearance of these provisions, remarked: “It is possible that Cutler may also have suggested providing

But even in the absence of such evidence, it is to be noted that nobody has ever challenged his claim of having introduced them. Their vast social importance, particularly that of the rules of intestate inheritance, has already been emphasized.³⁴⁹

The second portion of the so-called "temporary" part is the working or administrative plan of territorial government. It is impossible to assign individual initiative as respects the most illiberal features of this plan. Immediate self-government was abandoned, and a first stage of nonrepresentative government introduced, from the beginning of the revision of Jefferson's ordinance by Monroe's committee, and the absolute veto and other extraordinary powers of the governor were in the revised plan from the outset.³⁵⁰ This power to dissolve the general assembly, which Monroe included in his first

temporarily for the descent and conveyance of land, as it was of immediate importance to his company"—*Indiana*, 208.

The internal evidence of Dane's authorship is as follows. He was three weeks on the committee, was put on it again after an interval of six weeks (*ante* n. 158) and in the report submitted the next day (Sept. 19, 1786) the intestate provisions appeared for the first time—*Jour. Cont. Cong.* 31: 670. Dr. Johnson, the only other lawyer who might be expected to favor such views had long been a member without their appearing. Dane was fresh from comparative study of the laws of the states and these provisions were, in general, taken from the Massachusetts statute book. These facts strongly suggest his authorship. Mr. Barrett noted the Massachusetts source of the provisions—J. A. Barrett, *Evolution of the Ordinance of 1787*, 58; Dane, *Abridgment*, 7: 389-90; letter to Webster quoted in next note.

These provisions were temporarily removed from the plan sometime between the report of Sept. 19, 1786 and the debate of May 9, 1787—*Jour. Cont. Cong.* 31: 670 and 32: 281. Their restoration was undoubtedly due to the quality in Dane to which Judge Lowell testified—*ante* n. 324.

³⁴⁹ *Ante* cccxi-xii.

They abolished primogeniture (and though taken in general from Massachusetts law did not give a double portion to the eldest son), preference of males over females, and distinctions between relations of the whole- and half-blood. For the tendencies of the day see R. B. Morris, *Studies in the History of American Law*, ch. 2; W. C. Webster, "Comparative Study of the State Constitutions of the American Revolution," in *Annals of the American Academy of Political & Social Science*, 9: 380, 411. Dane was proud of this contribution. Long afterward he wrote of them to Webster: "These"—the compact articles—"and the titles to estates, I have ever considered the parts of the Ordinance that give it its peculiar character." "These titles were made to take root . . . in 400,000 square miles. Such titles . . . are, in their nature, in no small degree permanent; so, vastly important. I believe these were the first titles to property, completely republican, in Federal America; being in no part whatever feudal or monarchical"—letter of March 26, 1830 in *Mass. Hist. Soc. Proceedings*, 1867-1869: at 477. He claimed originality only in slightly modifying statutes so as to make his provisions "more purely republican and more completely divested of feudality than any other titles in the union were in July, 1787"—Dane, *Abridgment*, 9 (app.): 74.

³⁵⁰ *Ante* ccxc-xci.

report but which was thereafter omitted, had reappeared before May 1787³⁵¹ and was thereafter retained; but there is no evidence on which separable responsibility for this revival can be attributed to any individual.

The Ordinance compelled the governor and judges to "adopt" laws of the original states, and the wording of this clause was excessively vague and bad, though the power *as exercised* on the southwest frontier and later in the Northwest Territory was simple and sensible.³⁵² But bad as was the Ordinance's wording it was no more unworkable than Jefferson's would have been; it was worse only because Jefferson provided a preferable alternative,³⁵³ and the Ordinance provided none. The provision went through several stages, which clearly evidence the committee's perplexity. Since Dane had the last opportunity for an uncontrolled revision, and some of the provision's faults are both obvious and easily removable, he must bear responsibility for the clause's poor form. The worst result of its defects was to give Congress opportunity to make itself ridiculous in reprimanding the Territory's officials for being sensible in its interpretation.³⁵⁴

The idea that territorial inhabitants, as soon as they paid any taxes, should have "a voice in Congress" had been suggested by Silas Deane in 1776,³⁵⁵ and from Thomas Paine had come the more definite suggestion that a new territory should be "immediately incorporated into the Union" with "its immediate representation admitted into Congress, there to sit, hear and debate on all matters, but not to vote" for a fixed term of years.³⁵⁶ It seems obviously fair to assume that Jefferson knew both these writings, and borrowed from them the provision of his ordinance, which Monroe had discarded.³⁵⁷ To Dr. Cutler, as already noted, credit is indirectly due for its revival.³⁵⁸

However desirable Dane may have deemed the restrictive char-

³⁵¹ *Ibid.*

³⁵² *Ante* at notecall 264 and *post* ccccviii-x *seq.*

³⁵³ Compare *ante* ccliv and *post* ccccli-v as respects initiation of representative government under the constitution and laws of a chosen state.

³⁵⁴ *Post* ccccxlii-xiv, ccccxvi-vii.

³⁵⁵ Silas Deane's letter of Dec. 1, 1776—*ante* n. 225.

³⁵⁶ Thomas Paine's *Public Good* (1780). See *ante* n. 225.

³⁵⁷ *Ante* cclvi and cccxi.

³⁵⁸ *Ante* n. 330.

acter of the Ordinance's governmental plan to be in 1787—and then he emphasized it³⁵⁹—he naturally claimed no particular credit for it in later years in comparison with the “compacts” and the “titles to estates.”³⁶⁰

Passing now to the first and second of those compacts, of course their value lay in the fact that they expressed the Anglo-American tradition of personal liberties. They could have been taken from various places, but Dane took them from the constitution or laws of Massachusetts.³⁶¹ The original introduction into the Ordinance of the guaranty of the rights to jury trial and to the writ of habeas corpus took place in the Johnson report of September 1786, and the circumstances would point to Dane's influence exactly as in the case of the provisions on estates.³⁶² They were later transferred to the second compact article. It is at the end, also, of this same article that the clause against impairment of contracts is placed. Many lawyers would have applauded the introduction of the article, certainly none more heartily than Richard Henry Lee, with whom Dane had so much in common. Their rivalry as claimants for the credit of its insertion has been earlier referred to.³⁶³ Certainly no one would more likely

³⁵⁹ *Ante* at notecall 213.

³⁶⁰ “The organization, providing officers to select or make, to decide on and execute laws, being temporary, was not deemed an important part of the ordinance of '87. Charles Pinckney assisted in striking out a part of this in 1786”—Dane, *Abridgment*, 9 (app.): 75. (*Query*: in view of the next quotation, at end, should not “striking out” read “striking off”?) “The temporary parts that ceased with the territorial condition . . . soon pass away, and hence are not *important*. . . . Hence, whenever I have written or spoken of its [the Ordinance's] formation, I have mainly referred to these titles [to estates] and articles [of compact]; not to the *temporary* parts, in the formation of which, in part, in 1786, Mr. Pinckney, myself, and, I think, Smith, took a part”—Webster letter, in Mass. Hist. Soc. *Proceedings*. 1867-1869: at 477. “The 3d part . . . consists of the *six fundamental articles of compact*, expressly made *permanent, and to endure forever*”;—see *ante* at notecall 52 *seq.*—“so, the most important and valuable part of the Ordinance. These, and the titles to estates I have ever considered the parts of the Ordinance that give it its peculiar character and value”—*ibid.*

³⁶¹ See the quotations by Mr. Barrett, *Evolution of the Ordinance of 1787*, 60 *seq.* Dane so stated in his *Abridgment*, 7: 389-90. “Generally, when persons have asked me questions respecting the Ordinance, I have referred to the Ordinance itself, as evidently being the work of a Massachusetts lawyer on the face of it”—letter to Webster, *ante* n. 360, at 477. “If any lawyer will critically examine the laws and constitutions of the several States, as they were in 1787, he will find the titles, six articles, &c., were not to be found anywhere else so well as in Massachusetts, and by one who, in '87, had been several years in revising her laws”—*ibid.* 479.

³⁶² *Ante* at notecall 348.

³⁶³ *Ante* cccxi, cccxil. Both and Richard Henry Lee had joined the

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have thought of it than a conservative lawyer from Massachusetts, where Shays' Rebellion had just taken place. But nothing, also, is more probable than that Dane and Lee had talked of it, and that each might say he had the idea first.

As respects other matter in the second compact article, there is no evidence that Dane did or did not, as to any provision, act on the suggestion of others. Mr. Dunn and others have made suggestions that are wholly speculative.³⁶⁴

There was nothing of much novelty in the exhortation in the third compact regarding religion, morality, and education. No doubt many would have thought them then, as do some today, the noblest words in the instrument. They had a large background, mainly in New England.³⁶⁵ Dane may have received suggestions that they be included:

committee after Monroe and his group (*ante* nn. 319, 332) had prepared a governmental plan as "tonic" in most respects as could be desired. But in a direct guaranty of property rights they made a great addition. Such a guaranty must have been universally desired, but since it was state legislatures that had been impairing contracts there was no hope for relief otherwise than through the general government. The old Congress, through the Ordinance, gave the guaranty as against territorial legislation (and supposedly as against legislation by the new states to be formed in the Northwest); the new Constitution gave it as against all states. On the claims of Dane and Lee see Dane, *Abridgment*, 7: 450 and 9 (app.): 76; Lee to Washington, July 15, 1787 (in which, however, he made no claim)—Burnett, *Letters*, 8: 620; Lee to G. Mason, May 15 (showing his desires for restraint on state legislation)—J. C. Ballagh, ed., *Letters of R. H. Lee* (2 vol. 1911-1914), 2: 421. See also Carter, *Territorial Papers*, 2: 46 n. 24; *Univ. of Pa. Law Rev.* 95: 344-45; Madison in No. 44 and Hamilton in No. 7 of *The Federalist*.

³⁶⁴ Continuing his efforts to give all possible praise to Dr. Cutler, Mr. Dunn says: "Possibly, too, he may have suggested the first, and the greater part of the second articles of compact, but these might with more plausibility be assigned to Richard Henry Lee. The first secures freedom of conscience, and the second personal and property rights. Both were favorite dogma with Virginians of Lee's school"—*Indiana*, 208.

There were perhaps no other men in Congress who would have given to all these personal liberties the emphasis given them by Dane and Richard Henry Lee, both of whom opposed adoption of the Constitution as creating too strong a government, and in particular because that instrument lacked a bill of rights—E. C. Burnett, *The Continental Congress*, 694-98. Their insertion was in accord with American tradition (*ante* clxxxiv-v), as was proved by the prompt amendment of the Constitution. Here, too, then Dane's (or Lee's) good judgment was upheld by the report of the committee and by the action of Congress in 1789 in submitting the bill-of-rights amendments to the states.

³⁶⁵ Professor Turner found the origin of federal grants for education in the New England practice, in land grants for new towns, of making such reservations—*The Frontier in Amer. History*, 74. In the army officers' plan of 1783 there was provision for schools and academies—O. Pickering, *Life of Timothy Pickering*, 1: 546, or in W. P. Cutler, *Manasseh Cutler*, 1: 157. The same was true of Bland's plan of 1783—*Jour. Cont. Cong.* 24: 386.

some writers have thought Dr. Cutler, as a clergyman, particularly likely to have done so; and claims were made by his descendants that he did so, as in the case of slavery.³⁶⁶ This is quite possible, although the evidence, as already stated, is unsatisfactory. On the other hand, a man sufficiently interested in education to be one of the important early benefactors of Harvard, and sufficiently idealistic to contribute and take pride in the plea for honorable treatment of the Indian,³⁶⁷ perhaps needed no suggestions. Moreover, Dane was close to Rufus King, in sympathies and in association with the Ordinance's preparation, and Timothy Pickering had pressed these matters on King in 1785.³⁶⁸

The fourth compact was taken almost wholly from Jefferson's ordinance. The importance of the provisions was very great. As already said,³⁶⁹ their selection by Jefferson as fundamental in a scheme of territorial government evidenced his statesmanship, and their revival by Dane after they had been dropped from the governmental plan by his predecessors proved his good sense. They were not, however, original contributions by either.³⁷⁰ To these borrowings from

Rufus Putnam in his letter of June 16, 1783 to Washington in behalf of the officers' plan urged provision for the ministry—W. P. Cutler, *op. cit.* 1: 171; and the Vandalia grant provided for this—A. B. Hulbert, *Ohio in the Time of the Confederation*, xviii.

³⁶⁶ Mr. Dunn said: "To Dr. Cutler may safely be assigned the origination of all of the third article of compact except what refers to the Indians"—*Indiana*, 208. And for this he does have a reason—216, also W. P. Cutler, *op. cit.* 1: 294. No doubt these provisions would fall under the "social and political ideas" for which Mr. Winsor wished to give Cutler credit—*ante* n. 345. Mr. Merriam (*ante* n. 4) had earlier credited him with this contribution.

³⁶⁷ *Ante* nn. 322, 324. Dane was extraordinarily active in committee work relating to Indian affairs in Congress.

³⁶⁸ O. Pickering, *Life of Timothy Pickering*, 1: 509.

³⁶⁹ *Ante* nn. 211, 212.

³⁷⁰ As Dane said, he took six provisions of his fourth "compact" from Jefferson's ordinance—compare *Jour. Cont. Cong.* 26: 277 with 32: 341. In order that what follows may be better understood they may be enumerated: (1) That the territories should forever remain part of the Confederation, (2) subject to the Articles and to the acts of Congress thereunder, (3) subject to pay their proportionate part of the Confederation's debts, but forbidden (4) to interfere with the Confederation's primary right of disposing of the soil, or (5) to tax its property, or (6) to tax the lands of nonresident proprietors higher than those of residents.

Now, two of these, nos. 4 and 6, had not been in Jefferson's original report (March 24, 1784—*ibid.* 279 n. 1; and who added no. 4 the writer has not noted; but the addition of no. 6 was moved by Elbridge Gerry, Jefferson seconding the motion—April 21, 1784, *Jour. Cont. Cong.* 26: 257. It is plain that divisions of opinion on such matters continued; for the first report

Jefferson there was added in the fourth article the provision on free navigation of the Territory's inland waters. Its first appearance in Congress was in a motion made a year earlier by Grayson, but the honor of first suggesting the importance of such a provision belongs to Timothy Pickering.³⁷¹

Compact Article V—relating to the creation of new states from the Territory—was the result of years of discussion in Congress, and had been included in every draft of an ordinance since 1784. And Article VI, on slavery, has already been considered.

That Dane *wrote* the Ordinance as presented to Congress is not open to question, for it is in his writing. If one did not know by the writing, there is considerable force in Dane's view that the style indicated the author. Often, he said, the first draft of his law writings had been "reduced half, or more. This naturally ends in a studied, compressed style, rather hard . . . and this is the style of the Ordinance, courteously denominated, in the discourse mentioned³⁷² 'a sententious skilfulness of expression'."³⁷³ The style was in fact poor, the joinder of the different parts of the Ordinance

(May 10, 1786) of Monroe's committee to revise Jefferson's ordinance preserved only two of these provisions, nos. 3 and 6—*Jour. Cont. Cong.* 30: 254; and the report of July 13, 1786 retained only no. 3—*ibid.* 405. Rufus King moved the reinsertion of no. 6, and also a resolution which would have covered nos. 4 and 5—*ibid.* 30: 406 n. 1. The next report—of Sept. 19, 1786 from Judge Johnson as chairman—included nos. 3, 4, 5, and 6—*ibid.* 31: 672. And such remained the situation up to and including July 9—*ibid.* 32: 281 n. 1, 283. But Dane, in addition to retaining these four went back to Jefferson for nos. 1 and 2. On those two see *ante* nn. 8-10.

The point is that none were Dane's, some were not Jefferson's, probably none were King's, but undoubtedly all had some history in Congress (and outside) which the sources do not fully reveal. But the statesmanship of Jefferson in first uniting them, and the sound judgment of Dane in again uniting them, seem obvious.

The omission of nos. 1 and 2 was doubtless due to doubts regarding the status of the territories. Wholly omitted, also, alike from the final Ordinance of 1787 and its earlier drafts above referred to, was Jefferson's provision that both the temporary and permanent governments of a territory (*ante* ccliv) should be "republican"—*ibid.* 26: 275, 276; see *ante* at note-call 7 and ccxcv.

³⁷¹ Grayson's motion of May 12, 1786 is in *Jour. Cont. Cong.* 30: 263. See Pickering to King, March 8, 1785, and later letters of King and Grayson to Pickering, in O. Pickering, *Life of Timothy Pickering*, 1: 508-12. King seconded Grayson's motion.

³⁷² The Inaugural Discourse of Justice Story as Dane Professor of Law at Harvard—mentioned by Dane in his letter to Webster—*Mass. Hist. Soc. Proceedings*, 1867-1869: at 475.

³⁷³ *Ibid.* 479.

clumsy, the phrasing of various individual clauses regrettably vague.³⁷⁴

If one asks the more difficult question *why* he wrote it,—instead of the chairman, Edward Carrington—the answer would seem to be that it was not because the latter disagreed as to some things in it,³⁷⁵ since he did vote for it,³⁷⁶ but because Dane was of the type of hard-working, methodical committeemen who always have materials collected and arranged, and available for a report.³⁷⁷ The difficulties of compilation were slight, for the plan of arrangement was simple: The first part—Dane's own contribution on estates, and the reference to descent and conveyances in the French settlements of the Territory—had undergone at least one revision in committee; the second—the governmental plan—had been repeatedly revised; the third—the articles of compact—was readily compilable by one of Dane's information and habits.

³⁷⁴ Dr. Poole's high opinion of the style is quoted *post* n. 377. President Hinsdale thought it "admirable" in style, but not in arrangement—*Old Northwest*, 269. Mr. Winsor, *Westward Movement*, 285—and Mr. Dunn, *Indiana*, 210—justly criticized it. The latter gives the following passage, without the explanatory brackets, as an example (from the Webster letter *ante* n. 372, at 479): "I have never claimed *originality*, except in regard to the clause against impairing contracts, and perhaps the Indian article, [which is] part of the third [compact] article, [this last] including, also [references to] religion, morality, knowledge, schools, &c." This bad example is, naturally, from a letter, in writing which one is prone to force accumulating new ideas into sentences already begun. There is nothing of the kind in the Ordinance, and probably nothing so bad in any *revised* writing of Dane. But it does illustrate Dane's own reference, in the text, to his "compressed style, rather hard." It is incontestable, on the other hand, that he improved in many places on the original form and arrangement of materials embodied in the Ordinance, and at various points improved the earlier drafts of the enactment. And *some* fatal obscurities he could not on his own authority, have removed; for example the statement of the rights of the inhabitants of the old French settlements—although it was inconsistent with Virginia's statute of 1778 (*ante* n. 256), and inconsistent with what Dane said (and wouldn't change) in Compact Article VI.

³⁷⁵ *Ante* at notecall 318.

³⁷⁶ *Jour. Cont. Cong.* 32: 343. Of 18 delegates present only one voted against adoption.

³⁷⁷ It was not due, presumably, to Carrington's lack of industry, for Jefferson described him as "industrious"—*Writings* (Ford ed.), 5: 150. Only a man of the type described could have compiled Dane's pioneer *Abridgment*; and as Dane had less than twenty-four hours in which to compile and write out the draft of July 11 for presentation to Congress, it seems reasonable to assume that his mind was clear as to what should go in. The Ordinance is not the only report written by Dane when not chairman of a committee—compare *Jour. Cont. Cong.* 32: 206, 33: 455 and n. Probably other cases could be found.

Dr. Poole, of course, thought it impossible that the instrument could

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And, finally, it seems quite impossible to differ with Mr. Dunn's conclusion "that, so far as any one man can be called the author of the Ordinance of 1787, Nathan Dane was its author."³⁷⁸ That he actually did independently contribute to the Ordinance the only parts claimed by him to be "original" (not copied), is supported by internal evidence in one case, seems highly probable (in view of his activity and reports in Congress on Indian affairs) in the other case, and has been challenged by nobody. Good internal evidence exists that some other matters were also original with him, in the sense stated; namely, portions of the governmental plan, unspecified by him because purely "temporary," or subjects in which he saw little significance or took no pride.³⁷⁹ In short, his originality was greater than he claimed. Beyond that he displayed wise judgment in resurrecting his provisions on descent, in resurrecting such of Jefferson's fundamental "principles" of the fourth compact as had been dropped in earlier drafts, in adding to those fundamentals Grayson's motion for the free navigability of the Territory's waters, and in introducing from the beginning into the legislation of our territorial system the guaranties ("constitutional" as against territorial assemblies) of personal liberties generally recognized in the constitutions of the confederated states.

One or another member of Congress may, at one time or another, have indicated to him views bearing on the topics of his report when neither could have known he was ever to write it; but after he had im-mured himself to write it, presumably none could have done so. All suggestions made to Dane by other persons as to what the report should embody seem, consequently, utterly without basis or value.

have been so compiled "on the refined and complicated plan so elaborately explained by him many years later,—by one who had shown such indifference to, and lack of knowledge on, the subject, as had Mr. Dane"—*Amer. Hist. Assoc. Papers*, 3: 290. ("Indifferent" because he did not move the slavery clause on July 11—*ante* n. 338; as for lack of knowledge—presumably in not realizing "the temper of Congress"—*ibid.* 293.) At that time the original draft had not been found—*ibid.* 288. But the plan was not elaborate—very simple, rather; and its style not at all "smooth, compact, and elegant," as Dr. Poole (thinking it was Cutler's, no doubt) once described it—*No. Amer. Rev.* 122 (1876): 225. It was not a task to require more than a fraction of a full day.

³⁷⁸ *Indiana*, 209. His conclusion was affirmed by C. R. King, the author and editor of Rufus King's *Life and Correspondence*, 1: 291-92. Others have at least described him as the "primary author"—A. C. McLaughlin, *Confederation and Constitution*, 125.

³⁷⁹ Such as those referred to in n. 360 and at notecall 362.

Dr. Cutler, we know, suggested "various amendments," but we do not know whether they were confined to the governmental plan; the writer, for reasons given,³⁸⁰ considers it virtually certain that they were. But most of those who have credited him with specific portions of the Ordinance have assumed them to have been among its compacts. It is true, moreover, that among the changes made in the governmental plan between July 9 and July 11 it is difficult to find "several" in which it seems likely that he would have been interested.³⁸¹ We know only that all the amendments he suggested were adopted except one; and that one, identifiable and above credited to him, was a very important one in the governmental plan.

³⁸⁰ *Ante* following notecall 333.

³⁸¹ Compare the plan in *Jour. Cont. Cong.* 32: 281, showing how it stood after the debate on July 9, when it was recommitted (to the new committee—*ante* n. 332), with the draft reported July 11—*ibid.* 314. As I would regard the changes, I find ten of considerable substance. One made the Territory divisible into two districts for governmental purposes, if later desirable; four fixed requirements of residence or citizenship or property as qualifications for voting or holding different offices. In these five Cutler might have been interested (none being in "the bill" he saw). In the other five I cannot conceive his having, by any possibility, been interested.

SECTION V

A REVIEW OF PRIMARY ADMINISTRATIVE PROBLEMS IN EARLY TERRITORIES UNDER THE ORDINANCE

Introduction.

It remains to consider the actual administration of government under the Ordinance of 1787, down to the admission of Illinois to the Union or a little later. For this purpose particular attention will be directed to the territories of the Old Northwest, but some references will be made to other territories whose governments were based directly or indirectly upon the Ordinance, completely or with modifications, for at least a portion of their territorial existence.¹

¹ The Southwest Territory, excluding the Ordinance's antislavery article—C. E. Carter, ed., *The Territorial Papers of the United States* (1934—), 4: 7, 11-12, 16; Mississippi Territory, with like modification—*ibid.* 5: 20, 145; Indiana Territory, with a liberalization as respected transition to representative ("second grade") government—*ibid.* 7: 8; Michigan Territory—*ibid.* 10: 6; Illinois Territory, with modification as in Indiana—*ibid.* 16: 6, 7; Alabama Territory, government as originally in Mississippi—*U. S. Statutes at Large*, 3: 371; Arkansas Territory, government as in Missouri—*ibid.* 3: 493.

The situation in Orleans and Louisiana-Missouri territories was peculiar. Both were for a time under unrestricted control by the president—see Carter, 9: 90 n. 10. It was not until passage of the act of Oct. 31, 1803 (*ibid.* 89—"An act to enable the President . . . to take possession of the territories ceded by France" etc.) that Governor Claiborne of Mississippi Territory and General James Wilkinson were named as joint commissioners (*ibid.* 94) through whom the President's power was exercised until a regular territorial government went into effect on Oct. 1, 1804. That government was established by an act of March 26, 1804 (*ibid.* 202) which created the Territory of Orleans and District of Louisiana. The government of the former was similar in centralization to that of the Ordinance (to which no reference was made), but with modifications; in particular, the judges had no legislative functions, those being entrusted to the governor and a legislative council (secs. 2-11, *ibid.* 203-10). By an act of March 2, 1805 (*ibid.* 405) the preceding temporary government was replaced by one similar to that of the Mississippi Territory, but with modifications, an all important one being the establishment in Orleans of a representative legislature; so that its affairs afford illustrations of administrative difficulties under the Ordinance only in that second stage of government when they were greatly lessened in number and gravity.

As respects the District of Louisiana, the act of 1804 (secs. 12-13, *ibid.* 211-12) made it administratively part of Indiana Territory, the executive powers of the governor, the legislative powers of governor and judges, and the judicial powers of the judges of the latter Territory being extended over the former. The executive and legislative authorities were actually exercised—F. S. Philbrick, *The Laws of Indiana Territory, 1801-1809* (*Illinois Historical Collections*, 21), cv n. 1, cxliv n. 3; Carter, *Territorial Papers*, 13: 172 and index s.v. "Harrison, Gov. William Henry." An act of March

The fact that the whole history of our territorial system was characterized by unrest is certainly irreconcilable with traditional laudation of American democracy. That it was quite as true of territories whose population was from the first virtually wholly American as it was of those whose inhabitants were affected by institutional and social inheritances from an earlier foreign dominion is good evidence that the fault lay in the character of the governmental system. It is true, indeed, that most of the misunderstandings between high territorial officials which embarrassed administration of the early territories were primarily attributable to temperament. With rare exceptions, however, it was a provision of the Ordinance, or the absence of a provision therein, which gave occasion, and sometimes justifiable cause, for collisions of temperament.

We have already summarily reviewed in the first section of this introduction the problems of judicial organization in the early territories of which Illinois was once a part.

The Ordinance's brevity was no merit—although the long persisting misunderstanding of the sense in which it was of constitutional character presumably fostered a contrary view. Despite the long time that it was under consideration by committees of Congress before its adoption, very little thought indeed seems to have been given to the details of its content and expression. Reference is here made to its governmental plan, exclusively. With slight alterations, that remained as James Monroe first drafted it;² it would seem that upon him and Dr. William Johnson—a member of his committee and his successor as chairman—the blame must fall for most of the defects that will be noted below. It had passed its second reading in Congress and been ordered to a third reading when the first petition from the Ohio Company blocked further consideration of it³ until Nathan Dane, in drafting a new report between July 9 and 11, took the old governmental plan which theretofore had been the Ordinance's sole content, prefixed to that the introductory provisions which became its first part, and added the six "compacts" that became its third part. Dane, of course, lacked authority to alter the governmental plan that had already passed a second reading in the Congress. He could be respon-

3, 1805 set up a new government over the District which was with very slight modifications that of the Ordinance of 1789—*ibid.* 13: 92.

² *Ante* cclxxxix, cccli.

³ *Ante* cclxx, cclxxii.

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sible for its imperfections only on three assumptions: that as a statutory expert he should have detected the Ordinance's defects; that he should have moved in Congress amendments to cure them; and that in the last disquieted summer of that body's existence amendments would have received attention. There is little—if any—reason to believe that effective amendment would have been possible. It happens, also, that even the first assumption is hazardous, for Dane was not interested in the governmental plan. Because it provided merely for a "temporary" status he took no pride in it,⁴ and presumably had given little thought to it beyond a general approval of its repressive character.⁵

Only systematic legislation or systematic interpretations by the attorney general could have cured the defects of draftsmanship, or minimized the confusion they caused, and clarification by either method was almost totally lacking. How little attention was given to the Ordinance clearly appears from two striking facts. It was stated in the fourth compact article (which Dane took in substance and words from Jefferson's ordinance of 1784⁶) that "the said territory shall forever remain . . . subject to the Articles of Confederation . . . and to *all* the Acts and Ordinances of the *United States in Congress Assembled*, conformable thereto." The first Congress under the new Constitution did not deem it necessary to change this language,⁷ although the first italicized word was most inapt, involving a momentous question if unaltered; and the other italicized words had no meaning under the new Constitution. The *statutory* act of the Confederation had been voided by the Confederation's dissolution, and had been replaced by the constitutional provision giving Congress (which was no longer the states as united by delegates assembled in Congress) the power to make all needful rules and regulations respecting the territory of the United States. That two attorneys general of the United States should have cited the above-quoted words of the original Ordinance, and have emphasized in so doing the word "*all*," in construing the applicability to the Northwest Territory of a law of the *new* Congress,⁸ is sufficient evidence

⁴ *Ante* n. 360.

⁵ *Ante* ccxcv, cccxxiv-v.

⁶ *Ante* ccclxxxii.

⁷ Compare Carter, *Territorial Papers*, 2: 47, 203.

⁸ The first was William Bradford, in an opinion of 1795, holding that an

that those words should have been eliminated in re-enacting the Ordinance in 1789.⁹ The attention of all departments of the new federal government was absorbed in putting that into successful operation. This, no doubt, was the chief reason why the Ordinance received such scanty clarification.

The other matter which illustrates the slight attention given to the initiation of government under the Ordinance is less striking but more important. Preceding the establishment of the new federal government in 1789, the officials of the Northwest Territory directed their letters and reports to Charles Thomson, the secretary of the old Congress. The Constitution gave the new Congress exclusive power to dispose of and make rules and regulations concerning the territory or other property of the federal Union. But Congress had

act of Congress taxing retail licenses for the sale of certain types of liquor extended to the Northwest Territory because of a general principle "that all the laws of Congress, unless local in their nature or limited in their terms, are in their operation coextensive with the Territory of the United States," and because of the provision in "the ordinance for their government"—Carter, *Territorial Papers*, 2: 520-21. The "ordinance for their government" was the statute of the new Congress, passed on Aug. 7, 1789—*ibid.* 203; whether that applied to the Northwest Territory, and whether the territories of the United States are part of the "United States" except as regards the international relations of the federal entity were constitutional problems, but he did not mention the Constitution. See also Governor St. Clair's destructive criticism of Bradford's opinion in a letter to the Secretary of the Treasury—W. H. Smith, ed., *The St. Clair Papers* (2 vol. 1882), 2: 378-83. Secretary Wolcott's answer to an earlier expression of St. Clair's views, and the latter's reply, are in Carter, *Territorial Papers*, 2: 521, 523-24.

The other opinion was Attorney General Charles Lee's, given in 1799. He expressed surprise that anyone should question "the true rule . . . that the General Laws of the Union reach every part of the United States"—like Bradford overlooking the questions whether those words meant the federal entity or the united states, and whether in either case the territories would necessarily be involved—"unless a particular and express exception be made." He also stated that the ordinance "of the 13th July 1787" established this; and that this was not mere inadvertence is shown by the additional remark that all authorities in the Territory derived authority "from the present constitution of the United States or from Congress under the late form of government"—*ibid.* 3: 66. He evidently, therefore, attributed some super-statutory character to the Ordinance.

⁹ Similar carelessness was shown in failing to provide for the appointment of general officers in the militia—*post* n. 276. Also in failing to prescribe before whom the governor should take his oath of office after the dissolution of the Confederacy, the original Ordinance having provided that it be taken before "the President of Congress," and no law of the new Union having altered that provision. In Michigan Territory the fussy scruples of Chief Judge Augustus B. Woodward made a mountain out of this molehill—Michigan Pioneer and Historical Society *Collections*, 36: 213-17.

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not convened or made any such regulations when the time came for the officers of the Confederation to turn over to representatives of the new Union the property and records of the old. Moreover, the new Congress consisted of two houses and had no secretary. It thus happened that Secretary Thomson, under instructions from Washington,¹⁰ delivered the territorial records to the Secretary of State. Matters pertaining exclusively to Congress were thus confided to a department of the executive. Four years later, when Governor St. Clair had occasion to inquire of the Secretary of State, then Jefferson, through what channel he should properly communicate with the territorial judges, then supposedly in Washington, Jefferson replied that "all the business of the Government" was apportioned among three departments, to one of which "every possible matter" belonged; and that everything not related to war or finance fell under the Department of State.¹¹ And so strong had this bureaucratic assumption already become that Jefferson's successor, Edmund Randolph, in remitting to the President a few months later copies of the laws of the Northwest Territory accompanied them with this astounding comment:

It was long doubted, whether it was the duty of the Executive to lay them before congress. But upon a closer examination of the ordinance, the propriety of the step flows from the right, reserved to Congress, to disapprove these laws. For how are Congress to get official possession of them, but by an official communication from the Executive files, among which they are lodged?¹²

From another earlier, and equally astounding, letter¹³ from Randolph

¹⁰ E. C. Burnett, *The Continental Congress* (1941), 726.

¹¹ Sept. 17, 1793—Carter, *Territorial Papers*, 2: 460.

¹² Jan. 24, 1794—*ibid.* 473. In the President's message (Jan. 21, 1795) transmitting the laws to Congress he wrote: "As it appears to be conformable with the intention of the 'Ordinance for the Government of the Territory of the United States Northwest of the river Ohio', although it is not expressly directed, that the laws of that Territory should be laid before Congress, I now transmit you a copy of the last received by the Secretary of State"—*Annals*, 3 Cong. 1-2 Sess. 37.

¹³ On July 23, 1793 he had written to Jefferson: "You will find that a limitation act has been disapproved by Congress. Perhaps the necessity of laying the act before them will appear from the laws, which I miss. But I confess, that it does not strike my eye in the act concerning the Southern territory, the ordinance establishing the Northern territory, nor the [blank] of No. Carolina. I will examine further"—National Archives: State Department, Letters and Opinions of Attorneys General 1792-1810.

as attorney general to Jefferson when the latter was secretary of state, it appears that the former referred in the above-quoted passage to his own "long doubts." It also appears that although in earlier searches he had looked at the acts of the old Congress—finally uncovering therein the provision of the Ordinance of 1787 as above stated!—this first Attorney General, under whose legal opinions the Union was launched, did not discover in the Constitution the rules-and-regulations clause that gave Congress *absolute* authority over the territory of the Union.

Obviously St. Clair's interest in the matter continued, for he later called Randolph's attention to the fact that the Ordinance required the Territory's officials to "report to Congress," that since 1789 there had been "no mode pointed out for those [their?] communicating directly with Congress," and that it had been "conceived that the communication which went formerly through the Secretary of Congress must now go through the Secretary of State."¹⁴ No formal action was taken in 1789; none was ever taken. It may be said that Congress, having never complained, must have been satisfied, which is presumably true. It by no means follows, however, that the practice thus accidentally established was desirable, or should have been accepted as such. Important consequences might well have followed from a direct communication between territorial officials and Congress. It would have established the immediate responsibility of Congress; action in an infinitude of cases would not have been postponed to executive initiation. It would have made plain to all men the exclusive power of Congress; very likely, the issue raised in *Dred Scott v. Sandford* could never have arisen. But, all those speculations aside—and returning to the point in illustration of which these administrative curiosities have been adduced: the fact that Congress acquiesced in being thus deprived of the immediate control of the territories which it could have claimed under the Constitution; and equally the fact that Congress, in re-enacting the Ordinance of 1787, explicitly *conferred* upon the president the power to appoint "all Officers which by the said Ordinance were to have been appointed by the United States in Congress assembled"¹⁵—these facts of them-

¹⁴ Aug. 24, 1795—Carter, *Territorial Papers*, 2: 535.

¹⁵ The Ordinance explicitly declared that Congress should appoint the governor, secretary, and (under the second stage of government) the legislative council—*ibid.* 41, 45. Immediately after providing for such appoint-

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selves show that the powers were given little attention, and they suggest that the supposed preoccupation of the Revolutionary generation with the division of governmental powers has been exaggerated.

Territorial Executive Problems.

These problems arose in considerable part from defects in the Ordinance. Altercations between Governor St. Clair and Secretary Sargent over administrative situations had become so general by 1793 that Edmund Randolph, in reporting to President Washington that nothing in the executive journal of the Northwest Territory required the latter's personal attention, characterized it as "very little more, than a history of bickerings and discontents."¹⁶

The less important of these may be said to have arisen from the necessities attendant upon the initiation of government in a vast and unsettled region. The secretary's duties were perhaps heavy; they certainly grew heavier while the governor's did not (at least not Governor St. Clair's); and the secretarial salary was little more than a third of the governor's. The Ordinance made the secretary responsible for preserving the laws and other public records of the Territory, including a record to be prepared by him of the governor's executive acts; and for transmitting copies of all these records to the central government.¹⁷ When St. Clair and Sargent were in the Illi-

ment of the governor and secretary it added: "there shall also be appointed a court of three judges" (who, with the governor, constituted the legislature under the first grade of government) without stating by whom; but elsewhere there is a requirement that "the Governor, Judges, legislative Council, Secretary, and such other Officers as Congress shall appoint" must take an oath. *Ibid.* 41, 45. Compare 203. In a report by Levi Lincoln, Attorney General, to President Jefferson in 1802 he admitted that this last passage carried "a strong implication of the right of Congress, or, rather, of the President"—was this alternative ironical?—"to appoint these three judges, and I am informed, this has been the practice. Independent of this pra[c]tice, upon the mere construction of the ordinance, I should have hesitated [to express an opinion] against the right of the Governor to have made even these appointments. The authority of making appointments is, expressly, given to the Governor, in all cases, in which it is not otherwise directed, and express positive provisions are not usually abridged by implications"—*ibid.* 209.

¹⁶ *Ibid.* 472.

¹⁷ In fact the Ordinance also explicitly conferred the same duty of *for-warding* the laws upon the "governor and judges"—*ibid.* 42-43, compare 535; that is, upon the governor, the secretary, and the judges, singly or collectively! Governor Claiborne of Orleans Territory (after having earlier served as governor in Mississippi Territory) was still uncertain in 1805, not

nois Country in 1790 of course it was necessary to have with them copies of the territorial laws that were to be made known in the French settlements. Sargent, however, declined to supply copies of the laws to the county judges—though they must, without such, be almost absolutely ignorant of the laws they were to enforce; “indeed,” Governor St. Clair wrote to the President, “the business of the office increases so fast that it would be impossible to do it.”¹⁸ Nevertheless, as new counties were established Sargent did supply copies,¹⁹ and for this

unreasonably, as to just what were “the proceedings of the governor in his executive department”—*ibid.* 9: 518. Secretary Griswold of Michigan Territory reported in 1807 that he had duly kept and preserved those proceedings and the laws, but had in his possession nothing that could be called “public records of the district”; that the governor and judges had appointed other custodians of deeds and wills (as, of course, was done in all other territories), and that if it was proper for him to have the legislative journals he begged to be empowered to demand them—Michigan Pioneer and Historical Society *Collections*, 31: 592. Attorney General Rodney gave an opinion that the custody of the journals should be retained by the legislature—Carter *Territorial Papers*, 10: 106. In fact, Congress had provided by a law of May 8, 1792 that the secretary’s duties should be subject to regulation by territorial legislation—*ibid.* 2: 396. By a “joint resolution” of Dec. 24, 1814 the General Assembly of Illinois Territory gave the secretary custody of the legislative journals. *Post* 181. After some decades passed Congress began to omit the phrase “public records” in enumerating those of which the secretary should be custodian.

¹⁸ W. H. Smith, *St. Clair Papers*, 2: 179. He also declined to supply copies to the territorial judges—Carter, *Territorial Papers*, 3: 319. The laws were doubtless always available to them when the legislature met, the governor and secretary being present—*post* n. 21. How the judges managed on circuit does not appear. Secretary Sargent presented to the legislature in June 1795 “a demand against the Territory, for ——— dollars on account of certified copies of Territorial laws, furnished by him . . . to certain public officers,” unspecified. It was tabled. *Ohio Archaeological and Historical Publications*, 30: 37.

Since our governmental traditions demanded some real publicity for the laws, the problem of a printing press was important in every early territory. In default of print, publicity could have been given by posting manuscript copies, but this seems never to have been done; in the Northwest Territory copies were never available. It seems to have been the custom in the Illinois Country under the French regime to read the laws and proclamations in court. In Upper Louisiana, under Spanish rule, important regulations were read to assemblages of inhabitants called by proclamation. To some extent this practice was continued in the American period. In Mississippi Territory General Wilkinson, at the instance of Governor Sargent, ordered to duty under the Governor an officer who was a competent printer, but he was subjected by his brother officers to humiliations for performing such menial work, and Wilkinson’s successor (“Observing that an officer might as well turn Taylor, or keep a Tavern at his Command, as to Print”) refused to consent that he continue the service unless on furlough. He was therefore ordered away—D. Rowland, ed., *The Mississippi Territorial Archives, 1798-1803*, 1 (1905): 179.

¹⁹ Carter, *Territorial Papers*, 2: 295, 318.

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labor additional remuneration was ultimately provided by a territorial statute.²⁰

In addition to the preceding there were other duties; unavoidable, but onerous and possibly irritating. The Northwest Territory was too extensive, and safe and passable roads within it too scanty, to permit of administration from a fixed seat of government. For the convenience of the inhabitants, therefore, not only was the judicial department ambulatory, but also the executive; and for the convenience of the governor and judges, who together constituted the legislature, that department was also to a considerable degree ambulatory. Governor St. Clair by no means visited every portion of the Territory yearly, as would certainly have been desirable; neither did the territorial judges regularly ride circuit yearly in its distant counties. But Sargent was generally present wherever St. Clair and the judges might meet as legislators,²¹ and at least on the Governor's long official journeys within the Territory Sargent accompanied him,²² carrying along with him "records of the Territory." On these trips, too, according to his statements, he acted not only in his official capacity but also, out of courtesy, as St. Clair's private secretary.²³ Such additional burdens of travel and labor were irksome. Naturally, Sargent queried the necessity of accompanying the Governor, emphasizing the burden of transporting the records (though St. Clair was undoubtedly justified in replying that at least those whose transportation about the Territory was permissible were "far from cumbersome"), and the danger of their loss.²⁴ However, when Sargent went

²⁰ By act of June 22, 1791—T. C. Pease, *The Laws of the Northwest Territory, 1788-1800* (I.H.C. 17), 43-44.

²¹ As illustrated by the legislative journal of the 1795 session—*Ohio Arch. & Hist. Publications* 30: 38. If Sargent had made of the statutes a copy for the use of St. Clair or of himself he need not have taken the originals on long and dangerous journeys, which he seemingly did; compare Carter, *Territorial Papers*, 2: 575, 579 with W. H. Smith, *St. Clair Papers*, 2: 414.

²² Notably, in 1790 and 1795 when St. Clair went to the Illinois Country—Carter, *Territorial Papers*, 3: 296-313, 439-43.

²³ *Ibid.* 2: 579.

²⁴ *Ibid.* 560, 579, and 512. Whether or not they were bulky, with reference to transportation, depends, naturally, on what parts could be considered properly transportable. St. Clair's views on that point (W. H. Smith, *St. Clair Papers*, 414-15) were quite sound. The records in care of the secretary of Mississippi Territory in its fifth year filled two boxes which are described in Carter, *Territorial Papers*, 5: 253-55 (together with two barrels "of Books papers. &c. Styled Spanish Records," *ibid.* 255).

alone to Detroit, to organize civil government in that remote portion of the Territory, he took with him, as acting governor, the territorial seal and, seemingly, all the original territorial laws, if not other territorial records.²⁵

Clearly, few if any of the above matters should or could have been regulated by statutory provisions. Some—for example, any question as to what executive, legislative, judicial, or land records could permissibly be carried around the Territory—might have been regulated by the Secretary of State; but it would seem that a common-sense understanding between Governor and Secretary should have sufficed. So St. Clair suggested, also, as respects a more important administrative difficulty that was involved in Sargent's acts at Detroit. The original Ordinance contained no provision for an acting governor in case of a governor's absence. The act of re-enactment in 1789 did provide that in case of the governor's death, removal, resignation, or "necessary absence" the secretary should exercise his powers and perform his duties.²⁶ The provision, however, did not define "absence," nor did it refer to salary. Now, the secretary's salary was seven hundred and fifty dollars, and the governor's (as governor and superintendent of Indian affairs²⁷) was two thousand;²⁸ and as St.

²⁵ *Ante* n. 21.

²⁶ Carter, *Territorial Papers*, 2: 203. Governor St. Clair was responsible for the insertion of such a provision—*ibid.* 205, and W. H. Smith, *St. Clair Papers*, 2: 416. When Governor Claiborne of Orleans Territory confused in his accounts the functions of governor and secretary, Jefferson wrote to the Secretary of the Treasury (April 24, 1805): "The office of the Secretary of the territory is so completely the office of the Governor, that it requires no great latitude of construction to identify them, because there is not a single official act of his which may not properly emanate through the Secretary"—*ibid.* 9: 443-44. (Jefferson also remarked that "with respect to Claiborne's account I think his situation so totally different from that of all other governor's as to justify peculiar indulgences." This referred to the cost of living in New Orleans and to the obvious fact that various items of the account were merely estimates. It did not refer to his *legal* position; under the law of the time—*ibid.* 202—that was not peculiar.)

²⁷ See *post* n. 41.

²⁸ Complaints by the secretaries against the injustice of expecting them to perform, as acting governor, the duties of both offices for only the secretary's salary were vain. Compare *ibid.* 5: 241-43, 249-51. By the time our last territories were organized the salary of governors had risen to \$3500, of secretaries to \$2500, and of judges (who started with \$800) to \$3000. See M. Farrand, *The Legislation of Congress for the Government of the Organized Territories of the United States, 1789-1895* (1896), 51 and App. B (57-93; analyzing all statutes). Very rarely, if ever, could these salaries have insured independence. Nevertheless they did attract some extraordinarily able men, and doubtless a great many of fair abilities.

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Clair, in seven years of his term, had then been outside the Territory and Sargent performing all his duties for more than three and three-quarters, the disparity in salary was understandably galling to Sargent.²⁹ It happened that St. Clair had prepared the way in Congress for extending civil government to Michigan—with extra pay for the trip by both of them, which the President recommended to Congress; but since the latter had done nothing, and the President had not ordered the trip despite that inaction, St. Clair was of the opinion that Sargent's action was improper.³⁰ The latter, however, had long before sought advice from the Secretary of State regarding the Governor's absence, and the propriety of the trip by himself if St. Clair should not return in time to make it, and although the Secretary's reply was only written after Sargent was near Detroit it approved of his views.³¹ The important points are, however, that no matter which official was in the right both were within the Territory; that, in fact, St. Clair crossed the boundary before Sargent had reached Detroit;³² and that the complete governmental organization of Wayne County lacked legality if the word "absence" in the Ordinance meant "outside the territory"—as St. Clair, after precedents of royalty, first interpreted it.³³ However, the goings and comings of royalty were notorious; but as Sargent said, without a spirit of divination he could not know when the Governor entered the Territory.

²⁹ Carter, *Territorial Papers*, 2: 647-48 and W. H. Smith, *St. Clair Papers*, 2: 404, 406, 413 for the dates involved. (In the table on p. 648 the sum total should be "3-6-15," but in the seventh line the number under "months" should be 19. The date "1793" is correct—*ante* 416, 420, 429, 430-34, 437, 455, 456.) Both men were dependent on continued federal employment, but Sargent (until his advantageous marriage in Mississippi Territory shortly after going there as governor) was both poor and in an inferior and therefore more precarious position. See as to St. Clair—Carter, *Territorial Papers*, 2: 312, 3: 212, and W. H. Smith, *St. Clair Papers*, 2: 393; as to Sargent—Carter, *op. cit.* 2: 295, 480, 481, 579, 632, 3: 452.

³⁰ W. H. Smith, *St. Clair Papers*, 2: 404, 414.

³¹ Carter, *Territorial Papers*, 2: 560, 565.

³² Sargent reached Detroit between Aug. 9 and 15, and his first official act there (and probably his arrival) was on the latter date—*ibid.* 2: 564, 3: 447. St. Clair seemingly crossed from Pittsburgh into the Territory on Aug. 14—W. H. Smith, *St. Clair Papers*, 2: 404. In 1814 Governor Cass was instructed that "in the event of the Enemy approaching Michigan" he might take such measures as seemed expedient. He acted on the authority; but, he wrote, as he "[could] not say that the Enemy are approaching the Territory" how could he, under the instructions, take precautionary measures?—Carter, *Territorial Papers*, 10: 474, 487.

³³ *Ibid.* See Dr. Carter's note—*Territorial Papers*, 2: 629. No formal action appears to have been taken.

St. Clair remained more than two months in the south, performing such official acts as were possible without seal and records, while Sargent did the same in the north. The former then suggested that the two should agree on how to treat "irregularities . . . [caused by] the functions of chief magistrate having been performed by both at the same time."³⁴ He declined, however, to consult the general government regarding such collisions of authority, to avoid which nothing more was required, he thought, than "a proper understanding" between the two officers. He did not see, he said, any other solution, nor therefore how the government could suggest any other.³⁵ In both opinions he would seem to have been correct. Sargent—made sensitive by foolish indictments brought against him under a territorial law for another such "usurpation" in the past—did consult the Secretary of State,³⁶ but he received no answer.

St. Clair left the Territory while Sargent was still in Wayne County (Michigan). In effect, Sargent had been master and St. Clair pupil in that episode. But he was an apt pupil, and the lesson he had thus learned he practiced against Sargent's successor, Secretary Byrd—taking with him the territorial seal when he left the Territory ("with a view," Byrd wrote, "to prevent me from appointing Republicans to Office"), and withholding from him the territorial records.³⁷ That, to be sure, was in the last unhappy months of his service.³⁸ Sargent's taking of the seal and records was entirely innocent,

³⁴ *Ibid.* 3: 460-64; W. H. Smith, *St. Clair Papers*, 2: 414.

³⁵ W. H. Smith, *ibid.* 416. If there was no agreement Sargent could not risk action as governor, hence there might be no executive head of the Territory for months at a time. If they should have agreed that Sargent act as governor up to a fixed date, it seems probable that the result would have been precisely the same, for St. Clair's affairs were so uncertain, travel so precarious, and he was so often prostrated by gout, that arrival on a day set would have been impossible. Even if arrival at Cincinnati or Marietta had been the act agreed upon, warning of approximate arrival might not have been received for weeks by Sargent, unless St. Clair had sent a special messenger in advance.

³⁶ See *ibid.* 415-16 and Carter, *Territorial Papers*, 3: 456.

³⁷ *Ibid.* 252; W. H. Smith, *St. Clair Papers*, 2: 339, 405, 415.

³⁸ This discussion of statutory obscurities (or incompleteness) and administrative perplexities will be clearer if the personalities of officials be disregarded, notwithstanding that these aggravated all problems and were the immediate cause of not a few. In every territory there were a few men—sometimes very able, but of an intriguing or volatile or passionate and domineering character—to whom must be attributed most of the prevalent unrest.

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and certainly as respects some records and the seal justifiable. But St. Clair's action was political, and it occurred to some territorial officials elsewhere to harass political opponents in the same manner.³⁹

St. Clair did not return to the Territory until after Sargent had left it as governor of the Mississippi Territory. During his absence, when there was prospect of a necessity for exercise of his powers as superintendent of Indian affairs, the thought that Sargent as acting governor might also have succeeded to those other powers roused anew his jealousy of encroachments upon his authority, and he consulted the Secretary of State. The reply, expressing the tentative opinion

Governor St. Clair was by far the ablest official, in the writer's opinion, of the Northwest Territory. Indeed, very few of all the officials in other early territories (such as Augustus Woodward in Michigan and Harry Toulmin in Mississippi) or in Washington approached him in ability. Relations between him and Secretary Sargent were for several years marked by sincere mutual esteem; their later misunderstandings must seemingly be attributed primarily to Sargent's exaggerated sensitiveness and lesser sense of humor—though both men were prideful of authority. On the charges against the Governor which led to his removal by Jefferson see R. C. Downes, "Thomas Jefferson and the Removal of Governor St. Clair in 1802" (1927), *Ohio Arch. & Hist. Quarterly*, 36: 62-77. Some of these charges will be referred to below in discussing the powers of territorial governors. Neither singly nor in the aggregate, even if proved, would the charges have justified—in the writer's opinion—St. Clair's removal. Jefferson's decision, Gallatin's narrow and bigoted partisanship (Downes, 69), and the petty manner in which Madison carried out the President's decision all appear to have been, as William Henry Smith said of the last (*St. Clair Papers*, 1: 246), "a striking illustration of the political madness of the time."

³⁹ In the Mississippi Territory, Cato West (after being Governor Sargent's most bitter enemy) was appointed to the secretaryship when a vacancy occurred therein (Carter, *Territorial Papers*, 1: 19, 2: 241); and having become acting governor when Governor Claiborne was transferred to Orleans Territory, was unwilling to resume his duties as secretary when Robert Williams was named (*ibid.* 1: 18) as Claiborne's successor, but took the territorial seal and records to his country home and refused to deliver them or to act as secretary. The Governor took the oath of office (*ibid.* 5: 395 n. 2), a month later he secured the seal (*ibid.* 409), three weeks later he "assumed" office (*ibid.* 352 n. 1), but West still kept away with all the records (*ibid.* 415, 402, 404), and eventually returned them only under the compunction of a statute (*ibid.* 576).

One of his successors, Cowles Mead, likewise withheld the records from Governor Williams for two months and refused to show him letters written to the Secretary of State and Secretary of War by Mead while acting governor in the Governor's absence (*ibid.* 576).

In Orleans Territory one of its secretaries, who served for nearly five years, found it necessary to consult the Secretary of State as to his right to see the territorial records in order to perform his duties under the Ordinance (*ante* at notecall 14); Governor Claiborne having removed all except "the Laws, and some of the proceedings of the Governor, such as his appointments"—*ibid.* 9: 962-63. Needless to say, this secretary was not reappointed when his term expired four months later.

that "the Secretary would doubtless be excused" for acting in those affairs if required by the interests of the United States, was no doubt another slight discomfiture.⁴⁰ It was another point left open by early legislation.⁴¹

*Legislative Problems Arising from the Ordinance's
Omissions or Obscurities.*

(1) THE "ADOPTION" OF LAWS: MEANING OF "ADOPTION."

Far greater than the above difficulties raised by the obscurities of the Ordinance just discussed were those arising from its provision—quoting this as it appeared in the official congressional print of that instrument, and as it was reproduced in volumes of the territorial laws—that in the first stage of government "the governor and judges, or a majority of them, shall *adopt* and publish in the district such laws of the original states civil and criminal as may be necessary and best suited to the circumstances of the district." However, it also provided that "the laws to be adopted *or made*" should have force throughout the district.⁴² And after these words had already caused great inconveniences, Congress added to them in an act of 1792 a provision for printing "the laws of the territory that have been or hereafter may be *enacted* by the Governor and Judges thereof," and another provision authorizing them "to repeal their laws by them *made*."⁴³

These passages all raise the question whether the old Congress in 1787 and the new Congress, in employing both the words "adopt" and "make," used them unconsciously of any distinction between them, or regarded them as having distinct meanings but authorized action

⁴⁰ *Ibid.* 2: 629.

⁴¹ The Ordinance had no provision on the latter office, but the old Congress by a later resolution of 1787 (Oct.) had united its duties to those of the governorship. The Ordinance had required the secretary to remit periodically to Congress the proceedings of the governor "in his executive department" (*ibid.* 2: 41), but the resolution of October had no such provision as to Indian affairs. The question arose whether the governor was independently or *ex officio* superintendent. Manifestly it was convenient, when the governor was without the Territory, that the *acting* governor should *ex officio* exercise the superintendency, and so it became established in the Northwest Territory that such was true of the governor. See *ibid.* 3: 386; 2: 629; 3: 24, 87.

⁴² *Ibid.* 2: 42, 44.

⁴³ Act of May 8, 1792—*ibid.* 396.

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in either manner. The doubts that arose from their obvious obscurities very greatly complicated the problem of legislation in the earliest territories, gave rise to serious political controversies and unrest in three, and cast grave doubts upon the legality of most of the statutes of the first stage of government, particularly in the Northwest Territory. Yet there would seem to be little basis in common sense for all these doubts and controversies. If one assumes that enactment was subject to a restriction that the substance of laws be copied from enactments of the original states for political reasons—namely, to insure the dominance in the territories of sound republican practices in government—and concede legality to any statute, howsoever it be put together, so long as it satisfies that objective, all difficulties disappear; for nobody (except doubtless some ill-informed citizens who were misled by politicians⁴⁴) ever dreamed that a failure to copy completely and literally statutes that were “adopted” had endangered republicanism.

On the other hand, if one ignores the suggested (and indubitable) motivation of the Ordinance’s provision, and considers merely the ordinary connotations of the words employed, there again seems to be little difficulty. As very few officials ever referred, in arguing the legality of “adopted” laws, to the political objective, but merely disputed the meaning of the words “make” and “adopt,” most of what follows must be confined to a reflection of that narrow and sterile view.

Those words were never, in law, “words of art.” Approval by the governor and judges was all that was required for legislation under government of the first stage. What they approved *was* law, though Congress might annul it. Any bill formally approved by them became thereby a statute, was their “act,” and was enacted. Every such statute was “made” law, as distinguished from customary law. To legislate is always to “make” law. “The Existence of things *adopted*,” said Governor St. Clair, “is supposed in the very Term; & by no Rule whatever, can the Act calling into Existence be made convertible with Adoption.”⁴⁵ As a matter of ordinary language this

⁴⁴ For example, Robert McClure wrote from Cincinnati on Dec. 14, 1796 to Albert Gallatin: “Our situation is truly deplorable in consequence of our Government & Laws. . . . our laws are mutilated and very dissimilar to the original Codes from which they were adopted to the disadvantage of the citizen”—New York Historical Society: Gallatin Papers (from transcript in Nat. Arch.: State Dept., Miscellaneous Letters); italics added. There was no basis for assuming such disadvantage.

⁴⁵ Carter, *Territorial Papers*. 3: 276.

is, however, not literally true. For just as approval or adoption of a motion *to* resolve leads us to speak of the resultant resolution as "adopted," so when a bill is adopted and becomes a law it is common usage to speak of the law as adopted. The second of the above quotations from the Ordinance suggests (as the dictionaries show) that it was likewise common usage in that day to speak of laws indifferently as "made" or "adopted"—in either case, passed or enacted.

There was no need, then, as a matter of language, to read the Ordinance as making a technical distinction between "make" and "adopt." St. Clair gave the latter word a special meaning because he had in mind, and greatly emphasized in his letters to the first judges of the Territory, the Ordinance's political motivation.⁴⁶ His opinion is good evidence of that motivation. Assume that he was correct; that Congress required the "adoption" of sound and tested practices of republican government already embodied in the statutes of the original states. Nevertheless, in denouncing through a period of eleven years legislation in which he had joined, casting over all of it a cloud of doubt, only in a very few instances is there discernible any attention to the question whether there was in any of these laws a line of matter that conflicted with republican practices. The real issue was concealed under disputes over words.

In truth no one can say definitely whence the word "adopt" came, by whom it was suggested, or with what intent. Jefferson's ordinance of 1784 had proposed that settlers in the western country—no matter how few in numbers—should be authorized to meet "for the purpose of establishing a temporary government, to adopt the constitution and laws of any one of the original states"⁴⁷ Certainly, as already emphasized, the spirit of this provision was admirably liberal,⁴⁸ but to its practicality Jefferson had obviously given little thought. A formal adoption of the simplest existing constitution would have fastened upon a few frontiersmen a frame of government inconceivably beyond their capacity to support. To have adopted in the mass "the laws" of any state would have been an even more patent absurdity—as Judge David Campbell of the Southwest Territory pointed out in interpreting the loose compact between North

⁴⁶ *Ibid.* 273-78.

⁴⁷ *Journals of the Continental Congress, 1774-1789*, 26: 276, 256.

⁴⁸ *Ante* ccliv.

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Carolina and the Union "that the laws in force and use in the State of North Carolina" should "be and continue in full force within the territory . . . ceded until repealed, or otherwise altered by the Legislative authority of the said territory."⁴⁹ The settlers of Franklin and Watauga had no such absurdity in mind when they informally elected to live under the laws of Virginia and North Carolina. If they lived under such at all, it was only under selected laws modified to suit their circumstances,⁵⁰ and that is the way the Watauga inhabitants later lived under the Ordinance and North Carolina laws in the Southwest Territory.⁵¹ In effect that is what Anglo-Americans have done in scores of cases in different quarters of the earth, making or forming their laws from models before them, or earlier lived under and more or less definitely remembered.⁵² It was precisely what the settlers at Marietta did for four months, what those in the Ohio bottoms farther northeast did, what was done for years by the settlers of the Western Reserve.⁵³ Jefferson knew well the attitudes of the frontiersmen; his policy was to treat them fairly in order to save the Union; some of the southwestern state makers acted under the provision of his ordinance. In employing the word "adopt," he had in mind merely the regularization of frontier practices and an assumption of national control over them.⁵⁴

In Monroe's first draft of a governmental plan to supplant Jefferson's, it was provided that "the laws of——," except as otherwise provided, should have force in the Territory, subject to alteration by its legislature in the second stage of government.⁵⁵ This provision had every disadvantage of Jefferson's; with the additional disadvantage from the writer's viewpoint—but merit from Monroe's—of leaving no choice to the inhabitants. No doubt the disadvantages became clear, for in Monroe's second report no provision whatever on the subject was ventured.⁵⁶ In the report made immediately after Monroe's retirement (with Dr. William Johnson as chairman and Nathan

⁴⁹ "It would be preposterous to say the Laws of North Carolina are to be adopted *in Toto*"—letter of Feb. 25, 1792 to Secretary of State, Carter, *Territorial Papers*, 4: 124.

⁵⁰ *Ante* at notecalls 264, 284 of Sec. IV.

⁵¹ *Post* cccxxix-xxx.

⁵² *Ante* n. 281 of Sec. IV.

⁵³ *Ante* cccxvi, cccxlix.

⁵⁴ *Ante* cccxlix.

⁵⁵ Report of May 10, 1786—*Jour. Cont. Cong.* 30: 258.

⁵⁶ Same of July 13—*ibid.* 402-6.

Dane a member—and the change presumably due to the good sense of one) it was provided that the territorial *judges* should select as the Territory's criminal laws those of some one state, "in their opinion the most perfect," which should prevail unless altered by the territorial legislature, after its organization.⁵⁷ In a subsequent debate this wholly acceptable provision was replaced by that which appears in the Ordinance as finally passed, and which is quoted above.⁵⁸

It seems reasonably clear that Jefferson, wishing merely to favor the frontiersmen by sanctioning their instinctive desire to live under the laws of the state in which a majority had earlier resided (which has always remained American practice⁵⁹), made no technical distinction between making and adopting laws but used the latter word *merely to emphasize the freedom allowed in selecting a statutory model*. On the other hand, of the three substitutes above stated it seems reasonably clear that both Monroe's original provision and the one finally embodied in the Ordinance had for their purpose the establishment of sound political principles in the western country. The additional provisions giving an absolute veto over all territorial legislation to a governor appointed by the general government,⁶⁰ and giving a secondary power of disallowance to that government, as in the British colonial system, clearly indicated that its framers were dominated by that purpose. It has earlier been noted that virtually all our colonial charters sought to preserve political purity by forbidding legislation inconsistent with English law.⁶¹ The Ordinance's purpose

⁵⁷ Same of Sept. 19, 1786—*ibid.* 31: 670.

⁵⁸ At notecall 42. The draft last cited was debated on Sept. 21, 1786, and on April 26, May 9, and July 9, 1787—see *ibid.* 32: 275 n. 2. The report as printed *ibid.* 32: 281-83 shows how the draft stood after the debate on May 9 and after that on July 9; and the alteration to the form of the Ordinance as finally passed was made before May 10—*ibid.* 281. Evidently on the basis of evidence not available in the *Jour. Cont. Cong.* as printed, but referred to in *ibid.* 32: 242 n. 2, Dr. Carter states that the change was made in the debate of April 26—*Territorial Papers*, 2: 43 n. 15.

See *ante* xxxix at notecall 92.

⁵⁹ *Ante* n. 284 of Sec. IV.

⁶⁰ See *post* ccccl seq.

⁶¹ *Ante* cccxvii-viii. Governor Winthrop admitted that there was cause for fear as respected Massachusetts Bay, pointing out that the magistrates were loath, for two reasons to pass laws. First (though he put it second), because the growth of law by custom would not violate the charter prohibition; second, because "want of sufficient experience of the nature and disposition of the people, considered with the condition of the country and other circumstances, . . . made them conceive, that such laws would be fittest for us, which should arise *pro re nata* [*rei natura*] upon occasions," as the

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was the same, as no doubt was generally recognized at the time.⁶²

At first blush there is something extremely attractive in the idea of selecting from the statute books of all the states the laws best adapted to the needs of a new territory. To a man of culture and idealism such as Harry Toulmin the appeal was very great.⁶³ Governor St. Clair, too, saw advantages arising from the intermixture of laws from different states—and therefore best to be chosen, he

English common (customary) law had done—*History of New England* (Savage, ed. 1853), 1: *323.

⁶² It was, for example, recognized by Governor St. Clair and his first fellow legislators, Judges Parsons and Varnum. In order properly to prepare the Territory for admission to the Union, the Constitution requiring it then to be republican, the Ordinance's intent, said the judges, was "to prevent the adoption of laws that might support the principles of a monarchy." The proviso to which their legislation was subject, they therefore concluded, was this: "that such laws be not repugnant, but as conformable as may be to those of the original states, or of some one or more of them"—letter of July 31, 1788 to St. Clair in W. H. Smith, *St. Clair Papers*, 2: 70. Governor St. Clair's comment on these remarks was, that "to prevent the Introduction of Laws that might not be 'conformable to the Constitution of the United States; or inconsistent with Republican Principles; or that might support the Principles of a Monarchy', they would not suffer us to make new ones"—letter of Aug. 2, 1788 to the judges, in Carter, *Territorial Papers*, 3: 276.

In all the controversy over the adoption requirement an exaggerated importance was attributed to it. The Ordinance did not require the adoption of post-Revolutionary laws, only, of the original states; it did not, because of its reference to "laws," bar ante-Revolutionary laws on an assumption that all others were repealed by the mere success of the Revolution, for of course they were not. Monarchical principles in them were devitalized, politically speaking, but repeal came from constitutional changes and legislation inconsistent with the old laws; for example the law of 1776 adopting English law as of a certain date would have been a very desirable law for adoption had it not been specifically repealed before the legislators of the Northwest Territory adopted it—*post* n. 77.

One must either attribute to the Ordinance an intent that the legislators should adopt laws of the original states with an adjustment to republican institutions such as was from the beginning made, or impose upon its words other interpretations less consistent with those words and less consistent with what was actually done in the various territories. But the final and complete protection of the Union lay in the power of Congress to invalidate territorial laws.

⁶³ In a letter of Dec. 9, 1803 he wrote from Frankfort (Ky.) that he would prefer a judicial appointment "on account of its permanency: & possibly as the legislative power is lodged with the judges; there will be enough to do: at [any] rate there *ought to be*: for I have often thought,—that through the intelligence & activity of our territorial judiciaries,—a more regular & complete system of laws might be produced, than can reasonably be expected with that mode of legislation which prevails in states arrived at maturity. Let me be indulged if I solicit you to make some provision in congress for furnishing the Judges of the territory with the Laws of the several states"—Nat. Arch.: State Dept., Appointment Papers, Miscellaneous.

thought, by judges from different sections.⁶⁴ But the practical difficulties impeding even any moderately satisfactory solution of the problem immediately appeared. These impediments were wholly independent of the ability of the judges. That, though seemingly not exceptional, was sufficient for the task.

In the first place there was no adequate collection of state statutes available. Governor St. Clair tells us that neither of the judges of the original General Court took such a collection to the Territory, notwithstanding that each, in advance of beginning service, had received a quarter-year's salary to compensate him for the trouble and cost of procuring one.⁶⁵ Seven years later the laws of at least four other states seem to have been available to the legislators in Cincinnati.⁶⁶ No doubt the difficulty recurred in each new territory.⁶⁷ No doubt, too, instead of depending upon personal collections that had no assured permanency, it would have been better if Congress had established in each territory a permanent collection for successive judges.

⁶⁴ Carter, *Territorial Papers*, 2: 206.

⁶⁵ W. H. Smith, *St. Clair Papers*, 2: 334. The Governor was also a legislator, but whether he had received an advance on salary for the purpose in question does not appear. Secretary Sargent had procured in Boston "copies of Civil and Military Commissions, Passports, &c., &c., &c."—Carter, *Territorial Papers*, 2: 91. These (with modifications which were subject to no restrictions, though they must have conformed to changes in the laws) no doubt vastly facilitated the establishment of legal practices in the Territory.

⁶⁶ Massachusetts, Virginia, New York, and New Jersey. The number of laws taken from these states and Pennsylvania is given by Mr. Pease—T. C. Pease, *Laws of the Northwest Territory* (I.H.C. 17), xxvi.

The legislative journal of the 1795 session is in the *Ohio Arch. & Hist. Publications*, 30: 19-53. Thirty-seven enactments, including one repealing act, appear as approved in the journal, and all were printed in "the Maxwell Code." Two of these (one on petit larceny, p. 35; one on forcible entry and detainer, p. 43) were mistakenly omitted in the numbered list at the end of the journal (35 laws only).

⁶⁷ For example, two years after Secretary Sargent became governor of Mississippi Territory he informed his fellow legislators of certain volumes of laws received since their last session—D. Rowland, *Miss. Territorial Arch.*, 1: 231. In 1818 the secretary of Michigan Territory suggested to the Secretary of State the desirability of supplying his office "with entire sets of the Legislative Acts of the original States . . . there is not in the office the code of any one State"—Carter, *Territorial Papers*, 10: 713. Presumably some of the judges, and one would suppose at least Judge Woodward, had private collections; but among the reasons why he failed of reappointment in 1824 was a charge of "not having any book of law of [his] own nor ever reading books on law, but only books on science"—*ibid.* 11: 537. But see Mr. Blume's tribute to him—W. W. Blume, ed., *Transactions of the Supreme Court of the Territory of Michigan, 1805-1836* (6 vol. 1935-1940), 1: liv. See Philbrick, *Laws of Indiana Territory* (I.H.C. 21), cxiv n. 3, for other references to the subject.

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Legislation for that purpose came only later⁶⁸ and was seemingly very rare; however, as time passed law books must have become locally available.

An even greater difficulty was to find laws that were in the least suited to the simple conditions of the early territories. An excellent authority estimated that in the whole of what is now Ohio there were in 1793 about 3,000 souls,⁶⁹ distributed in eleven localities, with only two settlements larger than small villages. Far west of them were the settlements around Vincennes and in the Illinois Country, and far north those about Detroit. These little isolated settlements were very primitive. If laws were to be chosen to "suit their circumstances"—and there was always much talk of that,—it might seem that laws of the early colonies would have been better than contemporary laws of the states, as Judges Parsons and Varnum suggested⁷⁰ and Governor St. Clair agreed.⁷¹ It would seem a better view, however, that they needed laws adjusted in content to the social circumstances of their time, and that only in a simplicity of their judicial system and a celerity and inexpensiveness of procedure was any adjustment needed to geographical and economic conditions.⁷²

⁶⁸ The act creating Wisconsin Territory appropriated \$5000 for the General Assembly and Supreme Court—April 20, 1836, sec. 17, *U. S. Stat. at Large*, 1: 16. On Jan. 11, 1839 a committee of the House of Representatives recommended an appropriation for the Legislative Council and Court of Appeals of Florida Territory (seemingly one of \$5000) and said of the Wisconsin appropriation: "This is the only instance known to the Committee in which Congress has extended a like munificence to Territories, but one that may justly be regarded in future applications as possessing the character of precedent"—25 Cong. 3 Sess. H. Rep 159.

⁶⁹ See Carter, *Territorial Papers*, 2: 470 and index s.v. "Heckewelder, John."

⁷⁰ "Perhaps in their infancy their laws might have been suited to our situation, making allowance, however"—which is just what could not be done in adopting them literally—"for the progress of civil society; but the original States have revised their laws, and conformed their present codes to their situation"—letter of July 31, 1788 to St. Clair, W. H. Smith, *St. Clair Papers*, 2: 69.

⁷¹ Carter, *Territorial Papers*, 2: 207. His reason for only an infrequent use of them, which his statement implies, was "their having been generally repealed as the State of Society had changed," but compare the next note.

⁷² Governor St. Clair, who wavered considerably over the difficulties of the adoption problem (*post* n. 107), sometimes argued this way—*ibid.* 275. The age of statutes would be vastly more important in some fields of law than in others. Mr. Pease remarked: "Sometimes their legislation was antiquated. Certain Pennsylvania laws adopted in 1795 had been on the statute book of the colony for almost a century"—*Laws of the Northwest Territory* (I.H.C. 17), xxxi; but this criticism would not, I think, justly apply to the Pennsylvania statute cited *ante* n. 37 of Section I. Moreover,

Which were the "original" states? In Indiana and Illinois territories laws of Kentucky were freely adopted, without attention to theory; but the judges of Michigan Territory supported the same practice there by the theory (which, though doubtless not the intended meaning, was an excellent basis for a preferable working principle) that all states were original with respect to Michigan Territory which were created before 1805 and represented in the Congress that passed the act which that year created that Territory, since *that act alone*, giving to the Territory a government "similar" to that of the Ordinance, *gave any force to the Ordinance* in Michigan.⁷³ Under this theory the corresponding dates of 1800 and 1809 would apply to Indiana and Illinois territories, respectively, and justify the actions of their legislators.

It was agreed by everybody, in every territory, that a literal application of the adoption theory—that is, a transplanting of any statute *literatim et verbatim* into a territory—was impossible, even as respected laws of a general character.⁷⁴ For in adopting those it was necessary to alter all references to the enacting power, all dates, all

as respected just relations with the Indians, no better mode's could be found than very early colonial statutes of Pennsylvania, although as Governor St. Clair remarked those statutes "from a change in circumstances" had *there gone into disuse*—W. H. Smith, *St. Clair Papers*, 2: 74; Carter, *Territorial Papers*, 3: 275.

Among the laws collected in Mississippi Territory referred to *ante* n. 67, were "a volume from Connecticut and [one from] Virginia, but [each ?] of very old date." Governor Sargent, after hastily examining all the volumes, could not recommend any particular statute in any of them—Rowland, as there cited.

⁷³ Mich. Pioneer and Hist. Soc. *Collections*, 8: 603-4, report by Judges Woodward and Bates in 1805; *ibid.* 31: 362-63, letter of Judge Woodward to Secretary of State in 1806; Philbrick, *Laws of Indiana Territory* (I.H.C. 21), cix-cx. On practices in Indiana and Illinois territories see *post* n. 112.

⁷⁴ Judges Parsons and Varnum—W. H. Smith, *St. Clair Papers*, 2: 69; Judges Symmes and Turner—*ibid.* 365; Governor St. Clair to the Attorney General—Carter, *Territorial Papers*, 2: 319, in which he wrote: "it is certain that, from the peculiar Circumstances of the Country, in many Cases, no Laws of the original States would be found to apply to their Occasions exactly without alterations, and, if they were altered to those Occasions, they would cease, it would seem, to be the same Laws." They also recognized the propriety, of course, of adopting *entire* laws, and St. Clair referred to that as "the genuine" meaning of the Ordinance's clause—*ibid.* 3: 276. The judges seemingly started with some vague idea that the Ordinance could be satisfied by attention to general principles only, disregarding (or omitting?) "the particulars"—W. H. Smith, *St. Clair Papers*, 2: 69; St. Clair's reply, *ibid.* 73, or Carter, *op. cit.* 3: 273.

See the letter of Judge Woodward quoted in Philbrick, *Laws of Indiana Territory* (I.H.C. 21), cvii.

geographical names, and most descriptions of governmental departments and officers, in addition to the obsolete or obsolescent units of measure and money, the penalties, and the references to British supremacy that abounded in the statutory compilations with which the legislators worked. Even as to legislation of a general nature, therefore, it was essential, if any legislation was to be accomplished, to agree upon the limits within which alterations were permissible of a statute professedly adopted. In all territories it was regarded as proper to omit portions of a statute;⁷⁵ and when any reason was recorded for this decision a reference was made to the discretion allowed the legislators by the Ordinance's provision empowering them to adopt "such laws . . . as may be necessary."⁷⁶ Still, was the residuum thus adopted ever a "law"? What if only one sentence of one section be adopted from a statute of seventy-six sections?⁷⁷ Why not

⁷⁵ So declared by Judges Parsons and Varnum—W. H. Smith, *St. Clair Papers*, 2: 70; acquiesced in by Governor St. Clair—Carter, *Territorial Papers*, 3: 272; "Under the term *laws*, all *parts of laws* have been deemed to be included. Hence it has not been thought necessary to adopt the whole of a law from one State"—Judge Woodward stating in 1806 to the Secretary of State the Michigan practice—Mich. Pioneer and Hist. Soc. *Collections*, 31: 562. Governor Edwards of Illinois Territory ended an address to the General Assembly on construction of the Ordinance with an argument based on this earlier practice in the first stage of government: "the power to adopt laws from any of the States, and not from particular ones only, presupposes the authority of the Legislature to alter them as they shall think fit"—N. W. Edwards, *History of Illinois from 1778-1833; and Life and Times of Ninian Edwards* (1870), 91. Compare *post* ccccxix-xx. The practice of Governor Sargent in Mississippi Territory conformed to his practice as acting governor in the Northwest Territory, and was latitudinarian—see *post* ccccxiii-iv, ccccxvi-vii. So was the practice in Indiana Territory—*post* ccccxix.

⁷⁶ "We may admit such *parts* of any particular law as will be necessary, etc."—Judges Parsons and Varnum, W. H. Smith, *St. Clair Papers*, 2: 70. "The discretion vested under the term *necessary* has been construed to impart the power of *omitting any part of a law whatever*"—Judge Woodward, Mich. Pioneer and Hist. Soc. *Collections*, 31: 563.

⁷⁷ Mr. Pease gives this example from the 1795 "adoptions" in the Northwest Territory—*Laws of the Northwest Territory* (I.H.C. 17), xxix. Another most extraordinary case in that Territory probably did not arise elsewhere. The Ordinance did not say that adoptions were to be of laws "in force" in the original states, although Judge Burnet assumed that reading in his remarks on the adoption problem—Jacob Burnet, *Notes on the Early Settlement of the North-Western Territory* (1847), 63. Moreover, Governor St. Clair regarded as impossible the adoption of colonial laws that had been repealed "as the State of Society had changed"; nevertheless he thought such early laws *prima facie* suitable to the Territory, and various were adopted, notwithstanding that they had fallen into desuetude—*ante* nn. 65, 66. It happened that a very important enactment of 1795, declaring what constituted the basic law of the Territory, was adopted from a Virginia *colonial* law of 1776, which had been repealed in 1792. The effectiveness of the adoption

severable, as a *law*, if originally a distinct rule—regardless of others then joined with it? All parts were *law*.

If that difficulty could be ignored—as it was—why not combine in one territorial law parts of different laws?—and even of different states? The first judges thought all this quite proper—“And if this be granted, surely the diction ought to be rendered uniform.”⁷⁸ In Michigan it was deemed entirely “sufficient that all the parts of any law are sanctioned by the provisions of some of the States.”⁷⁹ Certainly such procedure would not endanger the republican purity of the territories, and probably all authorities would have agreed with the first judges of the Northwest Territory that the Ordinance should be given a “liberal” construction, consistently with promoting that Territory’s well-being and preserving it “in a due Dependence upon the general Government.” But Governor St. Clair, if laws of different states were adopted (and then only), could not “discover the least Difference between this, & legislating originally”; *this* was “making” a law.⁸⁰ Still, the Ordinance read “laws . . . of the original states”; it did not explicitly require the adoption of them singly—still subject to the question whether *part* of any statute could be a law the adoption of which, as such, was permissible.

No matter what theories might be correct, the fact is that St. Clair joined the judges in all of the above practices. He later stated, when Attorney General Randolph questioned the validity of the laws of

of the English common law as the basic law of the Territory was therefore legally doubtful for two reasons: one, that it purported to adopt, not a single law, but a great body of unenacted law and a great mass of statutes enacted up to a given date; the other, that the single Virginia law, by adoption of which the adoption of the English legal system was supposedly effected, was itself not an actual law in 1795. Tested by the postulated *objectives* of the adoption requirement either repealed or disused statutes were unobjectionable. Nor was there any sensible distinction between these cases and that of a mere fragment of an effective law.

Salmon P. Chase regarded the Virginia enactment as “not either at the time of its first enactment, nor at the time of its adoption . . . a law of an original *state*” in the sense intended by the Ordinance—*Statutes of Ohio and of the Northwestern Territory . . . from 1788 to 1833* (1833), 190 n. But this emphasis upon *state* seems unreasonable; compare W. H. Smith, *St. Clair Papers*, 2: 70-71, 76. The question was once legally passed upon, but the court was equally divided on the issue whether the English law had been made law in the Territory—Philbrick, *Laws of Indiana Territory* (I.H.C. 21), cii n. 1.

⁷⁸ W. H. Smith, *St. Clair Papers*, 2: 70.

⁷⁹ Judge Woodward, Mich. Pioneer and Hist. Soc. Collections, 31: 562.

⁸⁰ Carter, *Territorial Papers*, 3: 275, 276.

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1788, that he "gave way to the Opinion of the Judges, and to the necessity of the case."⁸¹ In a degree this statement, and its essential repetition in 1795 (to new judges, after the death of Parsons and Varnum), is entirely true. But it would be more acceptable to his admirers if in his letters to the judges he had yielded acquiescence solely on the grounds stated to the Attorney General. In fact, however, the personal opinions stated in those letters committed him to positive approval of everything done except the joinder in one law of laws adopted from different states. Other points, conceded, could have been contested reasonably; the final position where he refused outright approval was indefensible. His fellow legislators positively refused to put their action on the ground of necessity.⁸² Strangely enough, they did not in their letters even refer to the ambiguous wording of the Ordinance itself, already quoted.⁸³

The practice followed in 1788 was not altered in the scanty legislation of 1790 and 1791.⁸⁴ In 1792, when Secretary Sargent was act-

⁸¹ Letter to the Attorney General, 1790—*ibid.* 2: 319 (probably in July—compare *ibid.* 648 and W. H. Smith, *St. Clair Papers*, 2: 181). About a year earlier he had stated the matter more fairly to the President: "it became necessary that Laws, corresponding as nearly as possible to those of the original States, should be formed—their first formation was thought to be within the Province of the Judges in their legislative Capacity, the Governor reserving to himself the right to suggest such Alterations & Amendments as he should think necessary, either for the good of the People or the Interest of the united States, and finally to approve or reject them. The laws that have been published have been framed in that manner"—Carter, *Territorial Papers*, 2: 207.

⁸² W. H. Smith, *St. Clair Papers*, 2: 70.

⁸³ In Governor St. Clair's letter to Attorney General Randolph, *ante* n. 76, he emphasized this argument and attributed it to the judges. If he pleaded persuasion by the judges it was essential to attribute to them some arguments of force, and this particular argument had strength. If the judges urged it at all, it is strange that it was not urged in their letters.

⁸⁴ See T. C. Pease, *Laws of the Northwest Territory* (I.H.C. 17), xxiv. The first of the two sessions of 1790 was at Vincennes; a longer session was desirable; but Sargent would not stay there for a longer session, nor stay at Clarksville (Louisville) or Ft. Steuben for one; and Judge Symmes left the Territory in disregard of Sargent's call for a session at the eastern end of the Territory—see Carter, *Territorial Papers*, 2: 300, 302-4, 3: 317, 329, 330, 399-400. Another illustration of the difficulty of getting the legislators together is afforded by the antecedents of the session of 1795. St. Clair's proclamation of July 25, 1793 called for a session on Sept. 1. It was more than once postponed—in Sept. 1794 because of the Governor's illness, and later that year and winter because the judges were too far away (W. H. Smith, *St. Clair Papers*, 2: 356, 332). On May 29, 1795 they finally met at Cincinnati, Judge Turner coming from the Illinois Country, and Judge Symmes (who had gone up the Ohio to Marietta at St. Clair's call, only to find him not there—Symmes to St. Clair from Marietta, *ibid.* 339, and to Jona.

ing governor, he and two new territorial judges made a considerable addition to the laws and concurred in adopting views of their powers which were contrary to those of Governor St. Clair. Long afterward, just before receiving official notice of his elevation to the governorship of Mississippi Territory, he put upon the executive journal of the Northwest Territory a record that "the Volume passed in 1792 . . . proclaimed [his] *Belief*" that by the Ordinance the governor and judges had been "fully authorized to make laws as well as to *adopt* them."⁸⁵

In 1792, by a law already mentioned, Congress gave the governor and judges power to repeal laws "by them made," and disapproved one particular law of 1788.⁸⁶ The first of these provisions cured an

Dayton, June 17, 1795 in *Ohio Arch. & Hist. Publications*, 30: 15) from his home in the Miami Purchase.

Such difficulties were common in the early territories. Governor Wilkinson reported to the Secretary of State that he had postponed calling the first session of the Louisiana-Missouri Territory "until the heats and animosities between the Judges and the grand Jury have subsided"—really between the judges and Wilkinson, who was supposed to have made the grand jury his tool—Carter, *Territorial Papers*, 13: 254. Seven weeks later he reported that Rufus Easton, "With one Indictment found against Him, & two or three hanging over him, . . . instead of meeting the Legislature . . . has this day abandoned the Territory & set out for . . . Washington to meet his *Enemies*"—letter of Dec. 31, 1805, *ibid.* 370.

⁸⁵ Address to the judges (Symmes, Gilman, and Meigs, of whom the first had collaborated in the legislation of 1792), April 14, 1798—Carter, *Territorial Papers*, 3: 503. St. Clair had been absent from the Territory nearly two full years—*ibid.* 2: 648; Sargent was about to leave it, before the Governor's return; this journal entry was a last assertion of the independence which, as against the Governor, it had been so difficult to maintain. His additional remark, "I have not *since* had reason to change them," was intended to disparage the action of the House of Representatives in 1795 and the many contrary arguments of St. Clair.

⁸⁶ *Ibid.* 2: 396. The law disallowed was one of limitations—T. C. Pease, *Laws of the Northwest Territory (I.H.C. 17)*, 25-26. As respects repeals, no law of an original state could have afforded for adoption more than these words, or their equivalents: "The Law of ——— (state's name) dated ——— and entitled ——— is hereby repealed." The federal statute was clearly not intended to relieve embarrassment on that account; if such had been its purpose Congress must, logically, have disallowed various laws such as the one cited at notecall 77, *ante*. The real reason for the law was the Ordinance's provision that laws adopted for the Territory should "be in force until the organization of the general assembly therein, unless disapproved of by Congress." And a statute giving the power was necessary because, although a power of repeal would have been impliable from a general power of legislation it could not be implied from a power to legislate in a special manner only. (The point was too broadly stated in the reply of the Cato West group to Governor Sargent and the judges of Mississippi Territory—*ibid.* 5: 88.) The draftsmen of the Ordinance must either have deemed specification of the power unnecessary or they overlooked the problem.

important defect in the Ordinance. The second carried an implication that the other enactments were not invalid for lack of proper "adoption." This implication was consistent with the indifferent use by Congress, in this statute, of the words "make" and "adopt." Three years later the House of Representatives passed a joint resolution which disapproved all the laws passed in 1792 with one exception (a repealing act).⁸⁷ The Senate, however, refused to concur.⁸⁸ Although those laws had unquestionably been passed under an assumption by the legislators that laws might be either "adopted or made," as the act of Congress earlier that year had said,⁸⁹ there was no essential difference between them and most of the earlier laws of the Territory. Had the resolution passed, said Governor St. Clair, "though the laws enacted within the period referred to might have been the special object, the principle would have reached to every law existing in the Territory";⁹⁰ which was not strictly accurate, but true to a degree

⁸⁷ As recommended by a report of a House committee (May 24, 1794) printed in *American State Papers, Miscellaneous*, 1: 82. The essential proceedings of the House are in *Annals*, 3 Cong. 2 Sess. 1214, 1223, 1227 (joint resolution approved Feb. 16, 1795). It is difficult today to understand what it was which made the laws of 1792 seem particularly evil. There is, for example, an interesting letter from Griffith Green to Sargent. Green was a justice of the peace and a licensing commissioner. He impresses one as an honest man. He protested against "some of the Laws"—presumably, in particular, the law of Aug. 1, 1792 for licensing merchants, traders, and tavern keepers, T. C. Pease, *Laws of the Northwest Territory (I.H.C. 17)*, 61—as "not founded on the Bases, of sound policy, and . . . oppressive." He added: "The Law, I adhere to—Hoping the time will come when the interest of the commonalty shall be the first object, and this I doubt not will take place when the United States, in Congress assembled have leasure to attend to the Laws adopted by the Legislative of the Territory." He resigned his office because the laws were not "as wisely framed to the circumstances of the governed" as those St. Clair concurred in adopting—letter of Nov. 25, 1792, Massachusetts Historical Society: Sargent Papers (copy examined in State Dept.).

⁸⁸ *Ibid.* 825, 830. Judge Symmes, writing when he supposed annulment to have been effective, made some sensible remarks: "How far the safety and happiness of the United States were involved in the downfall of our little code of jurisprudence, affecting few more citizens and scarcely more energetic than the laws of some country corporation, especially as they had been undoubtedly been [sic] twice read, and ordered by Government to be printed, I will not pretend to conjecture. . . . We lived tolerably happy under them, & if I am not mistaken, the happiness of the people is the object of all laws"—June 17, 1795 to Jona. Dayton, B. W. Bond, Jr., ed., *The Correspondence of John Cleves Symmes* (1926), 171. On July 14 Symmes joined with Governor St. Clair and Judge Turner in the territorial act of 1795 by which most of the legislation of 1792 was repealed—T. C. Pease, *Laws of the Northwest Territory (I.H.C. 17)*, 256-57.

⁸⁹ *Ante* at notecall 42.

⁹⁰ W. H. Smith, *St. Clair Papers*, 2: 356.

that would have left little in the statute book.⁹¹ St. Clair also told the territorial judges that "if [he was] rightly informed," the Senate's nonconcurrence with the House was due only to the fact that "as they considered [the laws] all . . . void, they thought it improper to declare any of them so by an act of the legislature." There is no apparent justification for attributing to the Senate such shallow and irresponsible reasoning. Its action can be fairly interpreted only as tantamount to a judgment that the territorial laws, if not "adopted," were not therefore necessarily void.⁹²

The territorial legislature, which Governor St. Clair had for two years been attempting to bring together,⁹³ convened shortly after the above action of the Senate. In addition to laws supposedly invalid for lack of proper "adoption" there were undoubtedly, both in the Northwest and other territories, some which were void because the legislators lacked power over the subject matter, or because they conflicted with the Constitution or with treaties or with federal statutes.⁹⁴

⁹¹ Salmon P. Chase stated that, "Before the year 1795, no laws were, strictly speaking, adopted"—*Statutes of Ohio*, 25. This was true if one means adopted without change of place or personal names, official titles, dates, etc. Sensibly interpreted, it was not true.

One wonders who was primarily responsible for the congressional attempt to invalidate the territorial laws. The writer is inclined to suspect Edmund Randolph, who had shared St. Clair's views since at least 1790, when attorney general, and in 1795, as secretary of state, forwarded the 1792 laws to the President with a reference to disallowance—Carter, *Territorial Papers*, 2: 319, 472.

St. Clair was in Washington most of 1792 and half of 1793, and no doubt spread his opinions in official circles.

⁹² W. H. Smith, *St. Clair Papers*, 2: 356-57. An attribution to the Senate of an opinion either (1) that Congress, considered *alone*, should not act, or (2) that Congress, considering the nature of the issue, should leave it to the *courts*, would seem equally impossible. The latter, indeed, is an absurdity, for the Senate knew that no appeal lay from the General Court of the Territory and that the territorial judges would not pronounce their own acts as legislators void. As for the first suggestion, the Ordinance gave force to any "adopted" law unless Congress disapproved. It was therefore a positive duty to disapprove an undesirable law, to save the people from relying upon it. For the same reason it was a positive duty to disapprove any supposed law of whose nullity Congress was convinced, and there was no court to which the duty could be left or with which it could be shared. It seems quite reasonable to assume that the Senate acted upon those principles, and therefore one cannot accept St. Clair's interpretation of the Senate's action. On the contrary—in view of the ambiguous employment of the words "adopt" and "make" in the Ordinance and the congressional act of 1792—it seems wholly reasonable to reach the conclusion stated in the text.

⁹³ *Ante* n. 84.

⁹⁴ Notable were laws against treason in the Northwest, Mississippi, Michi-

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St. Clair undertook, seemingly, to purge the statute book of laws invalid, in his opinion, for any reason.⁹⁵ In an address to his two judicial colleagues (both of whom had joined Secretary Sargent, acting governor, in enacting the laws of 1792) he quoted his various criticisms since 1788 of all that he had joined in doing, assured the judges that he had always expected the territorial laws to be annulled if Congress should test their conformity to the Ordinance, and advised "an immediate repeal of all the laws of the Territory, and that laws of some or all of the original States be adopted and published in their stead." But if the judges disagreed, he said, he would point out "several laws which . . . should be repealed at all events."⁹⁵ That is, he was still putting himself on the record as for one action, but offering for the sake of harmony to join in other and inconsistent action. His record for eleven years in this respect did him no credit. The judges,

gan, Indiana, and perhaps other territories. Legally speaking, there can be no treason against a colony, because it is not a sovereign state, nor did the territorial legislatures have power to legislate against treason to the Union or to the several states, as John Jay tactfully made known to Governor St. Clair in 1789 (Carter, *Territorial Papers*, 2: 166, 188), and Judge Woodward, though of course not tactfully, to Governor Hull in 1810 (*ibid.* 10: 324). The imposition of cruel and unusual punishments upon convicted traitors, in violation of the *spirit* of the Constitution (not its letter, for the territories were not covered by its prohibition), was only an additional objection, although Governor Sargent mistakenly supposed that its removal would cure the defects of the Mississippi statute—D. Rowland, *Miss. Territorial Arch.*, 1: 230 (Mr. Rowland sharing Sargent's mistake). Cato West and his fellow opponents of Sargent corrected him on this point—Carter, *Territorial Papers*, 5: 87. The law of the Northwest Territory is in T. C. Pease, *Laws of the Northwest Territory (I.H.C. 17)*, 13, 322, and index s.v. "Crimes"; the Indiana law of 1807 is in Philbrick, *Laws of Indiana Territory (I.H.C. 21)*, 235, compare 427.

Other notable statutes *ultra vires* because falling within the field of Indian affairs, which were a matter of national and not territorial regulation (and which also, possibly, conflicted with a treaty—Pease, *op. cit.* xxv n. 3), were those regulating Indian trade or taxing Indian traders. See *ibid.* 26. Judge Turner, in the legislative session of 1795, moved the repeal of the act; see W. H. Smith, *St. Clair Papers*, 2: 354 and Carter, *Territorial Papers*, 2: 510, 514, 518. On taxation of Indian traders: L. Esarey, ed., *Messages and Letters of William Henry Harrison, 1800-1816* (Indiana Historical Society Collections, 7, 9), 1: 88; House report of Jan. 10, 1804 in Carter, *op. cit.* 7: 165-66, also 295, 493.

On Sargent's various tax laws in Mississippi see *post* ccccxiv. Some of these were undesirable because in conflict with the spirit of the Constitution, as were the arson statutes of Mississippi Territory, which included within the penalties for that crime whipping, pillorying, and unlimited forfeiture of real and personal estate—Rowland, *op. cit.* 1: 230 and Carter, *op. cit.* 5: 87. In Mississippi Territory, also, Governor Williams approved eight laws after the end of his term of office—*ibid.* 5: 714 n. 82.

⁹⁵ W. H. Smith, *St. Clair Papers*, 2: 357 seq. and 362.

too, professed to agree with the Governor "on the principle of adoption alone . . . in order that no impediment may lie in the way of legislative duty," although pointing out with proper emphasis the ambiguities of congressional expression, and lamenting that for some local needs there was no possibility of finding laws to adopt.⁹⁶ After this agreement it is doubly interesting to note what they did. St. Clair later spoke of the work as a true abandonment of earlier lax practices (though at the same time lamenting a recurrence to these in the legislation of 1798).⁹⁷ Salmon P. Chase stated that these laws of 1795 were "almost a literal transcript of the adopted statutes."⁹⁸ But they were such only in the claim made in their titles, not in fact. Mr. Pease has shown by a careful comparison of them with their supposed originals that there are "all possible degrees of variation" between them; that most of the enactments were "short sections of [the original] acts, considerably changed in wording and sometimes in intent"; that one law borrowed only one section from a long original act, and that section with more new than borrowed words as enacted; that another adopted only one sentence from one section of an original of seventy-six sections; that "no discoverable affinity" or "very little similarity" could be found between the new and the original law in two other important cases; that sometimes there were changes in essentials—as in omitting a provision that various equitable decrees of forfeiture should be conditional, or provisions for divorce in cases of consanguinity or affinity. In addition changes of mere form, and even of substantive matter, to suit the circumstances of the Territory were very numerous.⁹⁹ Among thirty-five laws there were four composed of parts from two states. The legislative journal—published in a newspaper as the work was done—frankly states many of the liberties taken with originals. It is a curious fact that in the first instance of borrowings on one subject from two originals these were printed as separate acts—one "allowing" and the other "regulating" domestic attach-

⁹⁶ *Ibid.* 364-65.

⁹⁷ Address of Feb. 4, 1799 to the lower house of the Assembly, *ibid.* 440.

⁹⁸ *Statutes of Ohio*, 1: 138 n. The Ordinance required laws to be adopted and published. The laws of 1788 are *described* in their titles as "published"; those of 1790, 1791, and 1792 as "passed"; those of 1795 and 1798 as "adopted and published." Half the laws of 1790 and all those of 1792 and 1798 were passed in sessions under Secretary Sargent as acting governor; the other laws were passed under the guidance of Governor St. Clair.

⁹⁹ T. C. Pease, *Laws of the Northwest Territory* (I.H.C. 17), xxvi-xxxi

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ment;¹⁰⁰ but there were four other such cases and in all these one enactment was allowed to include both originals, with no indication made in the title of the double borrowing.¹⁰¹ It is simple fact that although one repealing act¹⁰² did remove much earlier legislation (including all of nine, and part of a tenth, of thirteen acts passed by Acting Governor Sargent and the judges in 1792), the laws which replaced it contained—so far as adoption is concerned—all the essential vices of the old. Nor were there any essential changes, according to Mr. Pease, in 1798¹⁰³ although as above indicated, Governor St. Clair referred to the laws of 1798 (Sargent's, *nota bene*) as worse. One last attack on the laws of the Territory was initiated in Congress in 1799 but made no progress.¹⁰⁴

The chief difficulty, the lack of original legislative power, ended with the introduction of a representative government. The first legislative Assembly of the Northwest Territory met in September 1799, and Governor St. Clair, informing the members that *some* of the laws were of very doubtful validity—among them those relating to the militia, crimes, and taxation—counseled that “these” should be “either repealed and others substituted . . . or be confirmed by a general law to give them force.”¹⁰⁵ The Assembly thereupon, by its first act, declared “to be in force” (saving portions earlier repealed or altered) seventeen laws *passed before 1795* and not repealed by the legislators in that year.¹⁰⁶

What did this accomplish? This alone: it removed *one cause* for which Congress might in the past have exercised its power to

¹⁰⁰ *Ibid.* 137, 139. The journal required this—*Ohio Arch. & Hist. Publications*, 30: 34; in the list of laws at the end, however, they are listed as one law, *ibid.* 53.

¹⁰¹ T. C. Pease, *Laws of the Northwest Territory* (I.H.C. 17), 143 (small debts), 154 (courts), 193 (taverns), 197 (recording); corresponding journal entries in *Ohio Arch. & Hist. Publications*, 30: 34, 35 on first; 35, 36 on second; 40 on third, 37, 39, 40 on fourth.

¹⁰² T. C. Pease, *Laws of the Northwest Territory* (I.H.C. 17), 255.

¹⁰³ *Ibid.* xxix-xxx; one law not even purporting to be adopted. So far as the legislative journal is concerned that was equally true of one law of 1795, that on imprisonment for debt—*ibid.* 286; with reference to which differences between Judge Turner and his brothers very likely existed—*Ohio Arch. & Hist. Publications*, 30: 34, 37, 40, 49. But in the printed laws it is ascribed to Pennsylvania.

¹⁰⁴ In Senate, Jan. 15, 1799—*Annals*, 5 Cong. 2202, 2203.

¹⁰⁵ W. H. Smith, *St. Clair Papers*, 2: 451, 453. His basic statement was that the legislators “on several occasions . . . went further, and laws were enacted by them of their own authority” (451).

¹⁰⁶ T. C. Pease, *Laws of the Northwest Territory* (I.H.C. 17), 337.

annul the Territory's laws—that is, for imperfect adoption. But they still remained subject to annulment. It is proper to note that doubts of the legality of those laws because of supposedly imperfect adoption appear to have been due almost wholly (so far as ascertainable written evidence exists) to Governor St. Clair. Most certainly he could have laid those doubts had he willed to do so. Instead, he steadily joined in the acts whose legality he questioned, and in the final action of 1799 he was guilty of the duplicity of exempting from re-enactment the laws later than those of 1792, though they hardly less than the earlier laws required validation—if any did.¹⁰⁷

Legislation in other territories formed in the Old Northwest no doubt illustrated the same liberal interpretation of "adoption" as in the parent territory, although nobody has done for them what Mr. Pease did for it in comparing original and adopted laws.¹⁰⁸ By 1801

¹⁰⁷ In view of St. Clair's great intelligence and usual common sense it is very difficult to explain his record on the adoption problem. Were it not for one fact I should be inclined to attribute it to the excessive "legalism" which seems to result from knowing a little, but not much, law—law students are never again so technically legalistic as at the end of their first semester of study. That fact is the attitude of Attorney General Edmund Randolph; how a good lawyer (if he was one) could expose to instability a community's total legal system—and by statutory interpretations based upon no inquiry into the laws' operation, but upon perniciously narrow interpretations of words—is another mystery. Notice that from the first St. Clair and Sargent differed utterly on the requirements of adoption; that in 1792 the latter, with Judges Symmes and Turner, legislated frankly on the theory of general legislative power—(*post* ccccxvii); that in 1795 St. Clair, with the same judges, repealed three-fourths of those laws—after the United States Senate had refused to join in repealing all (*ante* at notecall 88); that Sargent, by one of the last entries made by him in the executive journal of the Territory defiantly proclaimed his views as unchanged by what had happened (*ante* at notecall 85); that the General Assembly under St. Clair's guidance then "validated" the few laws of 1792 (and others) not repealed in 1795; and, finally, that Sargent, attacked for applying in the legislation of Mississippi Territory the same views he had championed against St. Clair, carried the issue aggressively to Congress on the basis of the precedents of the older Territory; and although the narrow view of adoption was again mildly asserted no laws of Mississippi were disapproved on that ground, and the precedents were accepted as sufficient to bar personal censure of Sargent (*post* ccccxvii-viii).

St. Clair was extremely able, domineering, persistent, and markedly adroit. He bore down most men on most questions if they opposed him, as illustrated in the cases of Judges Symmes and Turner; but Sargent stood his ground. It is suggested that the differences between St. Clair and Sargent went deeper than the surface record shows. Despite the writer's admiration for St. Clair's abilities his sympathies are with Sargent as respects their personal relations. See *post* n. 133.

¹⁰⁸ Mr. Howe, however, states that some of the enactments "were clearly objectionable upon the same ground upon which Congress had disapproved

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it was apparent that Congress would not disapprove laws for alleged laxity in that respect. In Indiana Territory, out of sixteen professed "laws" or "acts" in the legislation of the first grade of government¹⁰⁹ there were three that included parts of two originals, and one law including three originals. But there was another and much more significant group of enactments; namely, eleven so-called "resolutions." Two of these were repealing laws, which needed no disguise after 1792 and had not been given any in the Northwest Territory.¹¹⁰ But the other nine were simply original legislation; and the large proportion of such laws in the total legislative output, as well as the boldness of the assumption that their name would give them immunity to congressional disapproval, suggest a feeling of legislative freedom.

Very similar is the record in Illinois Territory, but it indicates an even greater disregard of the supposed interdiction of original legislation. A total of thirty-four laws, under different names, were passed under the first stage of government.¹¹¹ Of these only thirteen purported to be adopted from laws of other states,¹¹² and there were

some of those of the governor and judges of the Northwest territory, viz: that they had not been adopted from the laws of the original states"—D. W. Howe, "The Laws and Courts of Northwest and Indiana Territories," *Indiana Historical Society Publications*, 2: 22.

¹⁰⁹ Philbrick, *Laws of Indiana Territory* (I.H.C. 21), 1-87; these descriptions ("acts," etc.) meant nothing—*ibid.* cix.

¹¹⁰ The legislative journal of 1795 shows a motion by Judge Turner that all resolutions, having the force of laws should be added as an appendix to the printed laws—*Ohio Arch. & Hist. Publications*, 30: 49; and four were so added. One of these read that whereas public ferries were a public convenience, but "no laws concerning Ferries can be found for adoption, but such as are of a local, not general nature," the governor should establish ferries "by proclamation, or otherwise," and the rates should be fixed by the Courts of Quarter Sessions. Another provided that when persons "sufficiently learned in the law" were available as judges in the Common Pleas "it would be the safer way to commission them during good behaviour"; and that commissions not expressly limited in duration should be revocable (supported by a legal "boner" that they "are in the nature of a grant, and must be taken most favourable for the grantor"). Still another empowered the governor, if he should find that decreasing population made it inconvenient to hold court regularly in the district of Prairie du Rocher, to abolish that district, suppress sessions of the courts therein, and divide it between the other districts of St. Clair County. See T. C. Pease, *Laws of the Northwest Territory* (I.H.C. 17), 287-88.

¹¹¹ *Post* nn. 113 and 164.

¹¹² In Indiana Territory three laws were adopted from Kentucky, two from Virginia and Kentucky in combination; in Illinois Territory six adoptions were from Kentucky—see *ante* at notecall 73. One of the Illinois adoptions was from the Pennsylvania constitution—*post* 40.

thirteen others which were examples of outright legislation giving no indication of adoption.¹¹³ A quotation already given from Governor Ninian Edwards¹¹⁴ is clearly indicative of the freedom with which the legislators acted.

Michigan Territory, created in 1805, may also be briefly dismissed. Legislative problems of the first grade of government found, indeed, their fullest and in some respects their most contentious developments in that Territory, which was subjected to the first grade for nineteen years. But in Michigan, as in Indiana and Illinois territories, Congress never interfered. On the issue between making or adopting law there was, too, very little difference of opinion between judges and governors, presumably because of the incisive and dominating character of Chief Judge Augustus B. Woodward. The loose practices of adoption in "Woodward's Code" were made much of by the partisans of the "Witherell Code," but the differences between those two bodies of legislation did not depend upon different practices in adoption but upon variant legislative procedures of another nature that will be referred to elsewhere.¹¹⁵ Almost immediately after the formal initiation of territorial government the judges were instructed, at the first meeting of the legislature, to consider and report upon the question whether they were empowered to "adopt" the laws of a state created since 1787. They promptly decided in the affirmative, as already noted.¹¹⁶ It is obvious that they were fully informed of the problems that had arisen in other territories (Judge Woodward came from the District of Columbia) and resolved to adopt settled principles to control their actions. A report, several times already quoted, made less than a year later by Judge Woodward to the Secretary of State, shows that every liberal practice followed in older territories

¹¹³ It is habitually stated that there were 35 laws. However, the first of these was in both form and fact a mere resolution declaring an *opinion* that the laws of Indiana Territory, of a general nature, were law in Illinois Territory. All the rest of the 35 were labeled "act" (25) or "law" (9). The 13 (including the initial resolution) which did not profess to be other than original legislation included 4 laws dealing with county courts, 4 with the General Court, 2 with arrearages of a sheriff, 1 with territorial revenue, 1 with legal advertisements. In addition to the 13 "adopted" and the 13 original laws just analyzed there were 9 repealing laws.

Dr. Carter's first volume on Illinois Territory (*Territorial Papers*, 16) contains, seemingly, nothing on the adoption problem.

¹¹⁴ *Ante* n. 75.

¹¹⁵ *Post* ccccxlvii seq.

¹¹⁶ *Ante* ccccviii.

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(with a single exception, for application of which there had been no opportunity¹¹⁷) had been followed in enacting the laws of "Woodward's Code" in 1805.¹¹⁸ In reporting to the President, immediately after its completion, upon the affairs of the Territory, Governor Hull and Judge Woodward stated frankly: "On all the subjects requiring legislation, the present Government act with difficulty, and on many cannot act at all"—and set out in convincing manner the absolute impossibility of literal "adoption" if laws were to be in any true sense laws of Michigan Territory.¹¹⁹ With equal frankness the later statement to the Secretary of State was printed as a preface to the original edition of "Woodward's Code." That facilitated attacks upon Woodward,¹²⁰ but had no other effect. Common sense was too evidently the foundation of the legislation to permit of its repudiation.

There is no reason to believe that Jefferson or any of his advisers ever doubted the propriety of the construction given to the Ordinance's provisions. It is questionable whether there was any actual doubt by anyone after an end was put to St. Clair's scruples in 1799

¹¹⁷ "Doubts existed whether there was authority to adopt a law which had been passed by a State, and afterwards altered or repealed; and how far the repeal of a law by a State, after its adoption by the Territory, affected its subsequent validity; but no cases occurred which rendered it necessary to decide these questions"—Mich. Pioneer and Hist. Soc. *Collections*, 31: 563. The first situation arose—perhaps Woodward knew it had arisen—in the Northwest Territory; see n. 77 *ante*. The second situation proved to be involved in a Michigan act of 1817; see *post* cccxxxix.

¹¹⁸ Government was officially instituted on July 2, 1805. These laws were enacted between July 9 and Oct. 8. Judge Woodward's letter, written in Washington on May 8, 1806 is quoted or cited *ante* nn. 73, 75, 79; *post* n. 179; it is an extremely clear, forthright, and comprehensive statement of the principles followed in Michigan, Indiana and Illinois territories; and, in general, can be rested on precedents of the Northwest Territory.

¹¹⁹ This letter was of Oct. 10, 1805—*American State Papers, Public Lands*, 1: 249. The statement is quoted more fully in Philbrick, *Laws of Indiana Territory* (I.H.C. 21), cvii-cviii.

¹²⁰ In a petition of Aug. 27, 1810 one point made was that all the laws were passed "when not one of the members of the local government were qualified with the freehold estate ordained by said ordinance. . . . Adjourn then we pray until you are legally qualified"—Mich. Pioneer and Hist. Soc. *Collections*, 8: 617, 619. These charges were almost certainly true in 1805; they may very well have been true in 1810; see citations in Philbrick, *Laws of Indiana Territory* (I.H.C. 21), xciii n. 2. The truth is, unquestionably, that if the Ordinance's requirements for voting and holding office had not been by tacit agreement ignored there would have been few legal voters, few qualified officeholders, and few valid laws in any of the early territories.

The sensible criticisms, by other petitioners of Oct. 16, 1809, of the Ordinance's adoption requirement is quoted in the last-cited work, cviii n. 1. There is another petition of July 1807 in Carter, *Territorial Papers*, 10: 116.

by the action of the General Assembly.¹²¹ One wonders whether St. Clair's position did not gradually come to rest upon a desire to deprive Republicans of a political issue. So far as "adoption" was anywhere an issue after 1795 it seems to have been essentially political, only.

As a matter of fact the issue, as one of law or legislative policy, had been settled in Congress in 1801. When Secretary Sargent left the Northwest Territory as governor of Mississippi Territory he pursued in the latter the procedure he had followed, and steadily defended against St. Clair, in the former territory. He was denounced in Natchez for his personality, his laws, and above all else for his advisers and his appointments. Primarily a soldier, and of an unapproachable, taciturn, and unpliant character, his enemies saw him (in both territories) as arrogant, insolent, and tyrannical. He was likewise a Federalist, and although he did not exclude Republicans from his civil and military appointments, his advisers and high appointments included none of the Republican extremists who were impatient to seize power in the Territory. Their differences, at first factional, became national when a Kentucky representative in Congress carried their memorials there early in 1800. In his words, Sargent had "acted under the influence of a faction and pursued the principles of despotism, by indulging an unwarrantable distrust of the great body of the people."¹²²

In essence his troubles were political, but his laws were made an issue in Congress. He had been little more than six months in Natchez when a grand jury of one county presented as "a great & enormous grievance" the alleged fact that the laws had been "framed by people . . . who did not pay that attention to the local circumstances and interest . . . of the Territory" which was proper—"particularly" in forbidding the inhabitants to bring into it from the Spanish territory across the Mississippi Negroes alleged by the inhabitants to be their slaves.¹²³ The complaint was put upon a less "particular" basis by the grand jury of another county a few days later, in presenting, as a fact and a grievance, the

¹²¹ *Ante* ccccxvii-xviii.

¹²² Thomas Terry Davis, later a judge of Indiana Territory—see Philbrick, *Laws of Indiana Territory* (I.H.C. 21), cccxvii, cccxxvi.

¹²³ Grand jury of Adams County, June 6, 1799—Carter, *Territorial Papers*, 5: 65.

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charge "that the Governor and Judges should assume to themselves the liberty of making Laws, whereas the ordinance . . . empowers them only *to adopt* laws."¹²⁴ The few ambitious individuals who engineered these presentments addressed themselves directly to the Governor and judges two months later. To the former they complained, in the character of a "Committee of Inhabitants," of "a want of confidence . . . clearly demonstrated in the rigorous and unconstitutional measure of the criminal laws," which should, they protested, "be administered with . . . clemency and humanity."¹²⁵ To the Governor and judges jointly they protested against the violation of the Ordinance in not adopting laws as it required. If, they said, this was "for want of the several State Codes (which is readily admitted) we conceive they might (in a dilemma like this) with great propriety have made it known to the People; who . . . would gladly have sent . . . [representatives] to assist in forming regulations for the time being . . . ; And regulations so formed, would have had all the force and Authority of Laws—the People . . . would have given them every practical support."¹²⁶ "Admitting"—the Governor and judges answered—" . . . that we have not a power to enact Laws on any occasion—upon what principle, can you Gentlemen . . . say that we ought to delegate a power to others which you deny to exist in ourselves?"¹²⁷ The Committee retorted that there was a great difference between "making laws" without power to do so and "forming temporary regulations" that would be "only a temporary compact Embracing . . . the various interests of the country."¹²⁸

To the charge of making, rather than adopting laws, the Governor and judges admitted so doing only when "evils actually existed" to

¹²⁴ Grand jury of Pickering County, June 17, 1799—*ibid.* 67.

¹²⁵ Sargent steadily contended that they were a minority of such a committee. Most of their letter to Sargent consists of vague political charges; first, against Andrew Ellicott (see DAB), upon whom Sargent had leaned for advice; second, against the latter. They denounced the supposed party favored by Sargent ("the spawn of corruption . . . basking in the sunshine of favour—fattening on the emoluments of Office, and smiling at the downfall of public confidence"), but their only specific demands were two. One was that the government should "avail itself of the aid of public opinion, in all future appointments, particularly in the Militia" (compare *post* cccclxvi)—letter of Aug. 26, 1799, in Carter, *Territorial Papers*, 5: 71-76, at 74. The other was the criticism of the criminal laws, stated in the text—*ibid.* 75.

¹²⁶ Letter of Aug. 27, 1799—*ibid.* 77-78.

¹²⁷ Letter of Oct. 5—*ibid.* 86.

¹²⁸ Letter of Oct. 21—*ibid.* 88.

remedy which no provision could be found in laws of the original states to which they had access; and that where they departed from models they had lessened fines and penalties.¹²⁹

There was, of course, basis for the charge that they had "made" laws independently. As above stated, the conflict was laid before Congress by a Kentucky representative, whose charges attacked a law on ferries—authorizing the governor to establish them "by proclamation or otherwise"; a law on crimes that included among the penalties for treason unlimited forfeiture of all property to the Territory; a law on taverns that provided for collection by the governor of license fees—also a practice of collecting fees for marriage licenses and for passports for travel from the Territory through the Indian country; and a law on fees that allowed the territorial judges fees for signing judgments, taxing costs, granting writs of error or supersedeas, and other official acts.¹³⁰ The ferry statute was precisely equivalent to the "resolution" of the legislators of the Northwest Territory in 1795, and to similar laws in Indiana and Illinois territories.¹³¹ It is conceivable that some model of a ferry law could have been found. But, after eliminating place names and other inappropriate details, what public policy could have been promoted by requiring a model for a statement that whereas public convenience required a ferry near ——— over the ——— River, now therefore, etc? The *penalty* for treason was unconstitutional if the Constitution had any relevance to territorial legislation, but it had not; however, as already noted, such legislation had no relevance to treason and the *entire* statute was for that reason a nullity.¹³² As for the fees for passports, tavern licenses, and marriage licenses, they too were based on precedents of the Northwest Territory.

¹²⁹ As in n. 127, *ante*.

¹³⁰ May 14, 1800—*Annals*, 6 Cong. 1 Sess. 717-18.

¹³¹ See *ante* n. 74.

¹³² See *ante* n. 94; ccxlii-xv, cxliii-v, cxliii-v. Penalties fixed in the statutes against treason, and arson, Sargent wrote to the Secretary of State, were "alike exceptionable. No legal decision or proceedings, however, have been had thereupon. . . . But, when it shall mercifully be considered that the law for the punishment of arson in the Northwestern Territory, subject to the same constitutional objections with any of the Statutes of this Government, had been ten years before Congress at the time we adopted it, (and never disapproved,) it must be received as an extenuation of our crime"—letter of Aug. 25, 1800, *ASP. Misc.* 1: 236 or *Annals*. 6 Cong. 2 Sess. App. 1384; 1381-89 for Sargent's letter of Aug. 25; 1376-97 for entire report.

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and had analogues in other territories.¹³³ Sargent defended them on the ground that they involved services outside the official duties

¹³³ A passport cost \$25 in Mississippi at this time. Leaves to enter or cross Indian lands were issued under the police powers of territorial governors as superintendents of Indian affairs; see committee report of July 26, 1787 to the old Congress—Carter, *Territorial Papers*, 2: 57. They might also be provided for in treaties—see, for example, *ibid.* 4: 63. To enter without permit upon Indian lands was an indictable offense—Philbrick, *Laws of Indiana Territory* (I.H.C. 21), clxxx. Passports were perhaps a useful means of keeping track of persons. Narsworthy Hunter, associate of Cato West as leader of Sargent's most bitter enemies, slipped away without a passport when he carried to Washington the memorial of the Committee of Inhabitants on which was based the reorganization of the Territory's government—D. Rowland, *Miss. Territorial Arch.*, 1: 245.

Governor St. Clair's salary of \$2000 as territorial governor and superintendent of Indian affairs was supplemented by allowances for office rent, stationery, and incidental expenses—usually \$300 annually, *U. S. Stat. at Large*, 1: 226, 500, 2: 523, 4: 189, 766. He was also allowed \$8 (usually) per day while actually engaged in negotiating Indian treaties. By resolution of Aug. 7, 1795 the governor and judges, and their servants, received free ferriage—T. C. Pease, *Laws of the Northwest Territory* (I.H.C. 17), 158, 287. And for some of his traveling expenses outside the Territory in 1787-1789 he was reimbursed by Congress—*U. S. Stat. at Large*, 6: 16.

The fees and licenses referred to in the text were a notable addition to income. After Sargent's organization of government in Wayne County in 1796 (*ante* ccxcvi-vii). Peter Audrain collected for him fees for tavern and ferry licenses. For Indian trading licenses he took from licensed merchants their written obligation to pay the fee Sargent should fix, informing them it had formerly been \$50, "but perhaps might be less now"; they made, he said, no objection—"they will cheerfully pay"—Audrain to Sargent, Oct. 31, 1796, Mass. Hist. Soc.: Sargent Papers (copy read in State Dept.). Before Governor St. Clair left the Territory (Sargent still in the north, acting as governor) he commissioned Major Gano "to give Licenses . . . to keep public houses" in Hamilton County (Cincinnati)—Carter, *Territorial Papers*, 3: 464. Acting Governor Sargent disputed the Major's power. The territorial attorney general, Governor St. Clair's son, reported to the Governor an intent to indict anybody acting under commission from Sargent, subject to St. Clair's approval—A. St. Clair, Jr. to Governor St. Clair, Ohio State Library: St. Clair Papers (copy read in State Dept.). In fact, the Governor had issued similar commissions for other counties to other persons. He explained that the power was merely "to distribute" the licenses; though signed by him in advance, the Major, he wrote, had been instructed to account to Sargent for the fees. But the other three parties had apparently not so understood, and the misunderstanding was a distressing one to Sargent. He renounced the "paltry" fee on licenses not signed by himself—St. Clair to Sargent, Feb. 22, 1797, Ohio State Lib.: St. Clair Papers and Sargent to St. Clair, March 20, 1797, Mass. Hist. Soc.: Sargent Papers (copies of both read in State Dept.). This is one of various instances in which St. Clair impresses the writer as having maliciously wounded Sargent, always with an adroitness baffling to his forthright and less nimble-witted old companion in arms.

When Governor William Henry Harrison of Indiana Territory, who had served a year and a half as secretary with St. Clair (Carter, *Territorial Papers*, 3: 508, 522), applied in 1805 for an increase of his salary as superintendent of Indian affairs, he wrote: "I have never received a single Six-

of his office, for performance of which his salary was paid.¹³⁴ But such a defense was unavailable to the territorial judges as respected their fees, and public policy certainly called for a minimum of charges on judicial costs—whatever the practice might be.¹³⁵ A resolution disapproving the tavern fee and the fees for judicial process passed the House of Representatives; the Senate proposed to amend this by invalidating all of the Territory's laws. This disagreement preventing separate action on the laws, that problem was later referred to a committee charged with an inquiry into Sargent's official conduct. This committee had before it all the complaints from the Territory, and was free to submit recommendations respecting both the laws and the removal or reprimand of the Governor. Its report was submitted a full year after initial consideration of the charges had first come before the House. Its conclusions were well pondered.¹³⁶

As respected disregard of the adoption requirement, Sargent was entirely frank. In one letter he wrote to the Secretary of State:

Many letters in your office evince my anxiety to have possessed the

pence either directly or indirectly for issueing of licenses to Trade with the Indians—a practice which gave to my predecessor at least 1000 Dolls per annum”—*ibid.* 7: 295. Jefferson recommended an increase, but the result was ultimately merely an increase in the salary of territorial secretaries (in Mississippi, Indiana, Missouri, and Michigan) from \$750 to \$1000—act of Dec. 5, 1807, *Annals*, 17 Cong. 1 Sess. 43, 2813; *U. S. Stat. at Large*, 2: 450.

The above data regarding St. Clair are probably typical of the early territories generally. On Harrison there is more information in H. J. Webster, "William Henry Harrison's Administration of Indiana Territory," *Ind. Hist. Soc. Publications*, 4: 188-89.

¹³⁴ And also on the "long-continued practice of the Northwestern Territory, and which received the approbation of [*i.e.* was not disapproved by] Congress"—Sargent to Secretary of State, Aug. 25, 1800, *ASP, Misc.* 1: 235.

¹³⁵ This ideal was voiced in both the Southwest and Orleans territories—Carter, *Territorial Papers*, 4: 265, 9: 779-80; but such fees were an unavoidable result of the inadequate salaries paid in the territories to the county and lower territorial officials.

¹³⁶ The resolution (May 9, 1800) is printed in *ibid.* 5: 92; see *Annals*, 6 Cong. 1 Sess. 717-18. In Dec. 1800 the author of the resolution, Representative Davis (*ante* n. 115) moved its reference to a committee to which had just been assigned consideration of certain election problems presented in a memorial from the territorial House of Representatives—Carter, *Territorial Papers*, 5: 107. An interesting debate followed, *Annals*, 838-54. The two matters were not joined; on the election problem see *ibid.* 1038. Ultimately, Davis's resolution went to a special committee charged with a general inquiry into Sargent's administration—*ibid.* 854. It reported on Feb. 19, 1801; see citations to this in the notes immediately following. What follows in the text refers to this committee. See Carter, *Territorial Papers*, 5: 93 n. 14, 94 n. 15, and 105 n. 44.

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codes of the original States.¹³⁷ We began by legislating, however, with the laws of the Northwestern Territory; they had been long subject to the disapprobation of the honorable Congress; and daring not to doubt their intention, we believed them good.¹³⁸

In another letter he wrote:

the Governor and judges very willingly admit "that they have made laws." As Secretary of the Northwestern Territory, and [*i.e.* when] vested with the powers of the Governor, I fully concurred with the judges that we were a complete legislative body. We never hesitated to manifest this to Congress; and the laws by Governor St. Clair, the judges Parsons, Symmes and Varnum, enacted as early as 1788, demonstrated that such also was their opinion. I solemnly . . . deny a deviation from the ordinance of Congress in the thus enacting of laws, for the ordinance, in my acceptation thereof, tolerates so doing; in strong presumptive proof of which . . . the laws which were regularly transmitted to the General Government, in one solitary instance only were disapproved. . . . As a further proof of their will and pleasure that we should "make laws," they have enacted, nearly in the words following, "that the laws of the Territory that have been, or hereafter may be enacted by the Governor and judges," &c.; and again, that the Governor and judges shall be authorized to repeal their laws by them made.¹³⁹

The committee, after frankly noting the precedents of the Northwest Territory, the inconsistent actions of its officers, and the failure of Congress to disapprove their legislation, concluded that although Governor Sargent's action in "making laws" and taking fees were "irregularities," yet they arose only from incorrect opinions and not from impure motives, and they therefore reported that there was no cause for further proceedings.¹⁴⁰ So far as regarded Sargent's removal from office, his enemies could afford to be content. Nine months earlier—at the time when the House had voted its disapproval of the tavern and court fees—the Territory's governmental system had been revised, and it had become evident that Sargent would not

¹³⁷ The committee report just cited prints his letter of Aug. 25, 1800 and quotes letters of March 3, 1799 and June 15, 1800. In the former he had written: "destitute of the laws of the several States, we necessarily *make* laws instead of adopting them; the right to do which has heretofore been a question"—*Annals*, 6 Cong. 2 Sess. 1380 or *ASP, Misc.* 1: 234.

¹³⁸ Letter of June 15, 1800—*Annals* (*ante* n. 129) at 1378 or *ASP, Misc.* 1: 233.

¹³⁹ Letter of Aug. 25, 1800—*Annals* at 1383-84, or *ASP, Misc.* 1: 233.

¹⁴⁰ *Ibid.* *Annals* at 1381; *ASP, Misc.* 1: 234.

be continued as governor.¹⁴¹ The mild dismissal of the adoption problem is substantively more significant. Sargent had made it plain that there were, for all his acts, precedents which Congress had for years either ignored or refused to regard as seriously objectionable.

If there was any doubt that the issue was a dead one, Congress made that clearer in its legislation for the District of Louisiana in 1804 and 1805. It would seem that if there was any territory in which it would have appeared essential to insure the observance of sound republican principles in legislation it was that District.¹⁴² Nevertheless, the terms in which Congress extended over it in 1804 the legislative authority of the governor and judges of Indiana Territory were these: that they should have "power . . . to make all laws which they may deem conducive to the good government of the inhabitants thereof," save for restrictions guaranteeing freedom of religion.¹⁴³ When the ordinary first grade of territorial government was extended the next year to the District (as the Territory of Louisiana—later Missouri) its own governor and judges were granted legislative powers in the same terms.¹⁴⁴

And thus Congress had come at last to realize—and tacitly admit now that Federalist officials had been ousted from the territories—that the adoption clause of the Ordinance had been an awkward, trouble-stirring provision; one that was unworkable and compelled evasion; and one that could be safely omitted.

(2) ANOTHER TYPE OF ADOPTION IN THE NORTHWEST: CONTINUITY OF TERRITORIAL LEGISLATION.

It is an extraordinary fact that in the course of all the events above narrated the parties to the controversies over the adoption pro-

¹⁴¹ By an act of May 10, 1800 it was given a government of the second grade—Carter, *Territorial Papers*, 5: 95.

¹⁴² In the Territory of Orleans legislative power was vested in the governor and legislative council appointed by the President. Their power was described as extending "to all the rightful subjects of legislation"—sec. 4 of act of March 26, 1804, Carter, *Territorial Papers*, 9: 202. It is an amazing fact that although Jefferson, after "examining" the Ordinance, saw that it would not do for the Territory of Orleans (*post* n. 154), he still believed "best to appoint a governor & three judges; with legislative powers, only providing the judges shall form the laws, & the Governor have a negative only, subject further to the negative of the National legislature"—Nov. 9, 1803, *ibid.*, 100. For Judge Augustus B. Woodward's views of the ideal government for Michigan in 1805 see *ASP*, *Misc.* 1: 462.

¹⁴³ Sec. 12 of same act—Carter, *Territorial Papers*, 9: 210.

¹⁴⁴ Act of March 3, 1805—*ibid.* 13: 93.

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vision of the Ordinance seem to have made no mention of the Southwest Territory. For that reason no reference to it has thus far been made by the writer. Yet the slightest attention to its laws would have ended controversies among reasonable men over the adoption problem in other territories. The cession act of North Carolina, although one of its conditions required Congress to govern the "ceded territory . . . in a manner similar to that . . . [practiced] in the territory West of the Ohio," contained another condition "That the laws in force and use in the State of North Carolina at the time of passing this Act, shall be and continue in full force within the territory hereby ceded until . . . altered by the Legislative authority of the said territory."¹⁴⁵ The execution of this latter provision was entrusted, as in the other territories, to the governor and judges. In 1792 Judge David Campbell submitted to the President this question: "where the Ordinance . . . and the Laws of North Carolina . . . are contradictory, which is to take place?"¹⁴⁶ The President declined to venture an opinion,¹⁴⁷ but in the Judge's "observations" (which were in fact a charge he had given to a grand jury) he gave precedence to the Ordinance. No one, he supposed, would deny it was the Territory's constitution in the sense that to it all the Territory's laws must conform. This was obviously true of any legislation by its governor and judges; Judge Campbell assumed that North Carolina and Congress would not have intended otherwise as respected North Carolina laws in force within the Territory *as territorial law*. Hence, as respected the number, titles, mode of appointment, and powers of officials the Ordinance controlled as against any provisions in North Carolina laws.¹⁴⁸ As to what laws of North Carolina were in force, and to what extent, the Judge declared:

our System of Laws is the Statutes of North Carolina as far as they apply to our particular Circumstances: The mode of administering those Laws must be conformable to the Ordinance. . . .

It would be preposterous to say the Laws of North Carolina are to be adopted *in Toto*. . . .

¹⁴⁵ See *ibid.* 4: 7, 11, 12, 16 for acts of North Carolina and the United States.

¹⁴⁶ *Ibid.* 121.

¹⁴⁷ *Ibid.* 130.

¹⁴⁸ For example, that portion of the territory of North Carolina which now constituted the Southwest Territory of the United States had two judges; under the Ordinance it had three.

It is evident that the laws of North Carolina were intended only to be partially adopted in the place of those laws that the Governor and Judges were authorized to Select from the Laws of the different States and that those Laws are to be administered by Officers appointed agreeably to the Ordinance: In no other way could it be a Government similar to that Northwest of the Ohio. . . .

[The condition giving force to the laws of North Carolina] could never apply to all the laws of North Carolina, but such only as suited our Circumstances as required by the Ordinance. . . . only such Laws of North Carolina as are applicable to the particular circumstances of this Territory were adopted. . . . It cannot be supposed that by the adoption of the Laws of North Carolina it was intended that the Ordinance should be abrogated, they were only intended to supply its deficiencies and so to make a more complete and perfect System of Laws.¹⁴⁹

Since the organization of the Territory Governor Blount had proceeded on the principles stated by Judge Campbell. In successive counties over a period of some three and a half months (one county comprised the present state of Tennessee) he convened all holders of commissions from the state of North Carolina, declared all commissions void, forbade any future action under them, read the Ordinance, and by its authority appointed all civil and military officers of counties, judicial districts, or other political subdivisions.¹⁵⁰ That the Southwest Territory enjoyed an administrative history of entire harmony is readily understandable. It was wholly untroubled by the controversies over statutory adoption which in other territories—where the problem was vastly simpler in legal possibilities—caused so much trouble. None of the officers of the Southwest Territory excelled St. Clair in ability, but they surpassed him in judgment.

The success in actual administration of this provision of North Carolina's cession act, which unquestionably, as interpreted, gave effect to the intent of Jefferson in his ordinance of 1784,¹⁵¹ is strong justification for the praise given in earlier pages to Jefferson's provision as compared with that of the Ordinance of 1787.¹⁵²

¹⁴⁹ *Ibid.* 123, 124, 125, 128.

¹⁵⁰ *Ibid.* 429 *seq.*

¹⁵¹ *Ante* cccii-iii.

¹⁵² *Ante* ccliv-vi, cclxxx-xxxi. On the other hand Francis N. Thorpe, whose work on *A Constitutional History of the American People, 1776-1850* (2 vol. 1898) contains a great mass of information on the spread of democracy, characterizes the Territory's organic act merely as subordinating the powers of Congress over the territories to the will of a local legislature (Tennessee's)—that is with respect to slavery—*ibid.* 1: 150.

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In view of its practical success in the Southwest Territory it seems odd that no suggestion was made that Congress adopt it in later territories in place of the unworkable plan of 1787. Jefferson's plan would have provided each territory, more quickly and with infinitely less trouble, with a complete body of statutes as far as was practically necessary. One's wonder over this matter is increased by the fact that as respects the Territory of Orleans and the District of Louisiana Congress did adopt a policy essentially the same as that followed in the Southwest Territory. Both of those territories had a considerable population.¹⁵³ Both of them, also, had a body of established law; to have introduced into them the Ordinance's provisions for legislation would not only, as Jefferson said, have turned "all their laws topsy-turvy"¹⁵⁴—if anything could have caused a revolution that would have done so. Accordingly in each territory the laws formerly in force therein (and not inconsistent with the acts of Congress creating them) were continued in force until they should be repealed or modified by their legislatures.¹⁵⁵ Far more than the Southwest Territory, as much as Orleans or Louisiana-Missouri, the Illinois Country might have been considered entitled to such consideration, and in theory it, too, did receive such, within one restricted field, in the Ordinance, although the rapid attainment by Americans of an enormous preponderance in the population (as likewise in Missouri) made the provision almost meaningless.¹⁵⁶

¹⁵³ The inhabitants of the District (Missouri) strongly objected to the extension over them of the legislative power of the governor and judges of Indiana Territory, on the ground that the latter had a smaller population.

¹⁵⁴ "Without looking at the old Territorial ordinance," wrote Jefferson to Gallatin (Nov. 9, 1803), "I had imagined it best to found a government for the territory or territories of *lower* Louisiana on that basis, but on examining it, I find it will not do at all; that it would turn all their laws topsy-turvy"—Carter, *Territorial Papers*, 9: 100.

¹⁵⁵ Sec. 2 of act of Oct. 31, 1803, as interpreted by the executive—*ibid.* 9: 90 n. 10; secs. 11 and 13 of act of March 26, 1804—*ibid.* 210, 211; sec. 4 of act of March 2, 1805 relating to Orleans Territory—*ibid.* 406; and sec. 9 of act of March 3, 1805 relating to the Territory of Louisiana (Missouri)—*ibid.* 13: 94. The Secretary of State cautioned Governor Harrison of Indiana Territory respecting the restriction thus put upon the power of the Indiana legislators to "make" law for the District of Louisiana—*Annals*, 8 Cong. 1 Sess. 1298.

¹⁵⁶ See Philbrick, *Laws of Indiana Territory (I.H.C. 21)*, ccxii-ccxxii; also *ante* ccxxvi *seq.*, ccxlviii-ix; and review of W. F. English, *The Pioneer Lawyer and Jurist in Missouri* (1947, University of Missouri Studies, 21, no. 2) in *Lawyers Guild Review* (1948), 8: 378.

At least two reasons, in their joint effect, explain why Congress was not forced to alter the Ordinance's legislative plan before it repudiated that and other stupidities by abandoning wholly the first grade of government. One is that, with seemingly the single exception of Governor St. Clair, the territorial officials agreed in so interpreting the adoption requirement as to make it awkwardly workable. The other reason is that the inhabitants of the Indiana Territory had the common sense—which, indeed, deserves rather the name of political genius—to put into practice, without any justification in the Territory's organic act for so doing, substantially the legislative system of the Southwest Territory; that is, in addition to the liberalized adoption requirement of the Ordinance. From the very first it was assumed in Indiana that the legislation of the Northwest Territory, not of a local nature, continued in force in Indiana Territory. Eight months later an act was passed by Congress, supplemental to the organic act, by which it was provided that all legal proceedings which on the day before that act became effective were pending in courts of counties assigned to Indiana Territory, or had been thence removed for trial in the General Court of the Northwest Territory and were therein at that time pending, were revived and continued, and that "the same pleadings before the rendering of final judgment and thereafter" should be had "in the same courts, in all suits and process aforesaid, and in all things concerning the same, as . . . might have been had in case the [Northwest] territory had remained undivided."¹⁵⁷ It is quite obvious that this implied the continuance of the same courts and jurisdiction, the same auxiliary officers, and practice—with all territorial legislation affecting those subjects; likewise the same traditional adjective law, and a great mass of substantive law imbedded therein. It obviously required, also, the appointment of judges, sheriffs, and coroners; and therefore the continuation unchanged of the counties—as did the reference to them in the supplemental act of Congress. But Congress merely belatedly approved what the officials of the new territory had instinctively done. All the county judges, sheriffs, and other officers had been appointed; all suits and proceedings, in Indiana and in the Northwest Territory's General Court, had gone forward unchanged.¹⁵⁸ No doubt there had

¹⁵⁷ Act of March 2, 1801—*U. S. Stat. at Large*, 2: 108. Division became effective on July 4, 1800.

¹⁵⁸ Philbrick, *Laws of Indiana Territory* (I.H.C. 21), cii-civ, cix n. 1,

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been a very natural assumption among the inhabitants of the new territory that laws passed *for* them, while citizens of the older territory, should not be regarded as ceasing to govern them when, by a change in boundaries, they were made citizens of a new territory created out of the old and with a political government precisely the same. And the general wording of the organic act, emphasizing a change merely "for the purposes of temporary government," would probably have been regarded as justifying the assumption.¹⁵⁹ Division was only for the purpose of bringing government, including courts very particularly, nearer home. It would have been insanity to *destroy* the entire governmental system, from townships and counties upward, and all the law by which government was paid for and regulated. The idea, undoubtedly, never occurred to the draftsmen of the organic act that they were doing so; and fortunately it never occurred to the inhabitants of the Territory.

In the case of Illinois and Michigan territories the same provi-

cxiv, cxlii and nn., cxxiv n. 2, cxvii n. 1, cxviii n. 3, cxxxi n. 1, cxxxiv n. 1, cxlix n. 5; *Pope's Digest, 1815* (I.H.C. 28) 1: xv-xviii. For appointments see W. W. Woollen, D. W. Howe, J. P. Dunn, eds., J. Gibson's "Executive Journal of Indiana Territory, 1800-1816," *Indiana Historical Society Publications*, 3: 75, 77-79, 92. There is a general discussion in L. J. Monks, ed., *Courts and Lawyers of Indiana* (3 vol. 1916), 1: 22-23, 33-36.

It would seem to be necessarily true that law of the parent territory could be enforced only so far as not inconsistent with the later law of Indiana Territory, and that any law of the latter must have been law in all portions of the Territory. Mr. Blume, referring to Wayne County of the Northwest Territory, the western portion of which was included in 1800 and the eastern portion in 1802 in the Indiana Territory, mentions Mr. Webster's citation (H. J. Webster, "William Henry Harrison's Administration of Indiana Territory," *Ind. Hist. Soc. Publications*, 4: 188 n.) of a decision by the court of Indiana Territory that a law of the Northwest Territory passed *after 1800* remained in force *after 1802* in what had been the eastern portion of the original Wayne County, though a contrary law was effective at the same time in the rest of Indiana Territory, including what had been the western portion of the original Wayne County—W. W. Blume, *Supreme Court of Michigan Territory*, 1: xxxv. I have never been able to believe this—Philbrick, *Laws of Indiana Territory* (I.H.C. 21), cv n. 1.

¹⁵⁹ In the writer's introduction to *The Laws of Indiana Territory* (I.H.C. 21), cv, he relied only upon that wording to explain why the laws continued unchanged, inexcusably overlooking the congressional statute which required continuance of the courts and the administration of justice. This statute was not mentioned by Mr. D. W. Howe, "The Laws and Courts of Northwest and Indiana Territories," *Ind. Hist. Soc. Publications*, 2: 14-15; nor by the editors of Secretary Gibson's "Executive Journal," 68-69, 75; nor by Mr. J. P. Dunn, *Indiana: a Redemption from Slavery* (1888), 294-95. But it was mentioned by Mr. Monks, *Courts and Lawyers of Indiana*, 1: 22, who remarks that it "gave color" to the assumption that a continuation of the territorial statutes in general was intended.

sion respecting legal proceedings was included in the organic acts. The same action was taken in Illinois as respects appointment and judicial proceedings, and legislation was also based from the beginning on the assumption of legislative continuity.¹⁶⁰ Since legislation affecting only special topics was, by unavoidable implication, "extended," we shall see that the governor and judges of Illinois Territory deemed it wise to proclaim by formal resolution their opinion that legislative continuity was in fact general. And, as just said, their own legislative activity was based on that assumption—as had been true in Indiana. On the other hand we learn from Mr. Blume that for slightly more than a year nothing in the laws or judicial proceedings of Michigan Territory indicated an assumption that the laws of the Northwest or Indiana territories were there in force.¹⁶¹ In September

¹⁶⁰ The provisions of the organic acts for Michigan and Illinois are in Carter, *Territorial Papers*, 10: 7 and 16: 7, respectively.

On April 28, 1809 Nathaniel Pope, secretary and acting governor, issued a proclamation that the Territory should consist of two counties—Randolph County "as it existed under the government of the Indiana Territory," and St. Clair, including all to the north of Randolph—E. J. James, *The Territorial Records of Illinois* (1901), 4; being Illinois State Historical Library Publications, no. 3; pages 3-61 of that volume being the "Executive Register, 1809-1818." On June 17, 1809 Governor Ninian Edwards appointed clerks of the Courts of Common Pleas of the two counties, but named no new judges to either court until Jan. 1811—*ibid.* 7, 8, 17. An attorney general was appointed July 24—*ibid.* 10. Beginning on April 28 in Randolph County and on May 3 in St. Clair he commissioned a large number of justices of the peace—*ibid.* 4-11 for the year 1809. The writer has examined all of these court records still existing; all of them are unbroken at the change of government. (President James's edition of the Executive Register will appear in corrected form in vol. 17 of Dr. Carter's *Territorial Papers*.)

See N. W. Edwards, *History of Illinois*, ch. 2.

¹⁶¹ Mr. Blume refers to John Gentle's statement that the governor and judges of Michigan had in July 1805 declared the laws of Indiana Territory, and the offices held thereunder, "null and void," which, if true, would have explained the total absence in the Woodward Code of references to those laws. And Mr. Blume says, "the governor and judges did not publish an act repealing the statutes of the older territory"—W. W. Blume, *Supreme Court of Michigan Territory*, 1: xxxvii, xxxviii. The cause of Gentle's confusion seems clear. He presumably referred to the principle, adopted in the first days of the Territory's existence, that "with respect . . . to the Territory of Michigan," the Ordinance of 1787 derived its "energy and effect" from the congressional act of 1805 that created that Territory—Mich. Pioneer and Hist. Soc. Collections, 8: 604. This is correct (no matter whether one agrees or not that, therefore, all states existing in 1805 were "original" states whose laws might be "adopted"—*ante* ccccviii). The Ordinance was made the basis of government in one territory in 1787, in other territories at other dates when they were created; it could not have had "energy and effect" as to them *before* they existed. Totally different is the question whether, once laws were passed (under authority of the Ordinance) for all the Northwest Territory, they should be regarded as *continuing to exist*

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1806, however, the General Court held that such was true of an Indiana law;—in fact an enactment of the Northwest Territory that was *enforced* in Indiana Territory before Michigan Territory had been created out of the latter,¹⁶² so that the decision recognized the entire line of inheritance. From this decision of the Michigan court cited above one of the judges dissented, but on grounds not convincing.¹⁶³ It is of more consequence that some territorial enactments of Indiana and Illinois territories have the appearance of being inconsistent with the principle that the legislation of the several territories was an unbroken whole except for modifications deliberately made.¹⁶⁴ These,

in parts of that Territory set off under separate governments (until modified by the legislatures of the latter).

¹⁶² W. W. Blume, *Supreme Court of Michigan Territory*, 1: xxxv-xxxviii, 58-61; 2: 84-91. See opinion of the Attorney General of the United States in Carter, *Territorial Papers*, 10: 45. On the later expungement from Michigan law of the statutory law of the Northwest and Indiana territories see Blume, 1: xxxix-xl.

¹⁶³ Judge Bates—see citation in Philbrick, *Laws of Indiana Territory* (I.H.C. 21), cv n. 1. Two arguments were based on the congressional acts successively creating the several territories. One was that the Ordinance established for each a “temporary” government, hence temporary laws, and to recognize as carried over into Michigan Territory the laws of its two mother territories would violate that intent. (This argument was urged by the defendant in *Bank of Michigan v. Williams*, in the lower court—5 Wend. (N.Y.), 478, 484; *post* at notecall 169.) The other was that the future exercise of governmental authority by the Indiana Territory in the portion thereof set off as Michigan Territory was forbidden, and that this provision would be violated if Indiana laws were enforced therein—by the *Michigan* territorial government!

There were also two arguments based on policy. One was, that the Michigan court should not be “bound by territorial precedents”—though no *judicial* decisions were involved, and only the persuasive authority of legislative precedents; that it should “avoid the errors and profit by the experience” of other territories—why not, then, profit here by their experience? The other was a sufficient and better “code . . . for governments so temporary and fleeting” as those of the territories could be found in “the Common Law”—the meaning of which, in this connection, can scarcely be imagined.

¹⁶⁴ Examples of a minor sort (there are few such) are instanced in Philbrick, *Laws of Indiana Territory* (I.H.C. 21), cii-ciii, cxiii n. 5.

Of exceeding importance, as flatly contradicting the continuity theory, would be the supposed first “law” of Illinois Territory, if in fact it *adopted* the law of Indiana Territory. Mr. Alvord, for example, in editing the Illinois laws of 1809-1811, counted their total number as 35, indexed the first as an “Adoption of the Indiana laws,” and explicitly stated that the legislators’ “first act was to adopt the Indiana laws except those which were of local character, *thus* making law for Illinois the code which had been evolved by the preceding governments, that of the whole Northwest and that of Indiana”—C. W. Alvord, *Laws of the Territory of Illinois, 1809-1811* (Ill. State Hist. Library *Bulletin*, vol. 1, no. 2, 1906), i, x, xi (*italics* added). Various other writers have said the same, including Judge W. L. Gross, “History of Mu-

however, are only curiosities in view of the *fact* of general continuity evidenced in statute book and court proceedings.

Whatever doubts might assail one respecting the legal sufficiency of the continuity principle, there could be no question of its superb qualities as a matter of public policy. The adoption principle of the Ordinance required each legislative act to be a search for, and then a simplification of, a statute of an old society. Jefferson's plan, tested in North Carolina, lessened the search but required the same simplification. Common sense led the legislators of the Old Northwest to two great improvements on the Ordinance. The lesser was to treat Kentucky, whose society their own approximated, as an "original" state. The greater was the principle of legislative continuity, which made simplification of a law for one territory serve for several. It promoted the *rapid* development of a great body of simplified statutes, common to several territories, throughout the Old Northwest and the upper portion of the Louisiana Purchase. Ultimately, Congress had the good judgment to adopt the principle in creating new territories. So, when Wisconsin Territory was created out of Michigan Territory, and Iowa out of Wisconsin Territory, and Minnesota out of Iowa

municipal Law in Illinois," Illinois State Bar Association, *Proceedings*, 1881, p. 89; and also the writer—*Laws of Indiana Territory* (I.H.C. 21), cv; but this error was corrected in *Pope's Digest, 1815* (I.H.C. 28), 1: xv-xvi. The governor and judges merely formally recited that "after mature deliberation, they hereby resolved *as their opinion* that the laws of Indiana Territory of a general nature and not local to that Territory *are still* in force in this Territory *as they were* previous to the first day of March last" (italics added), on which day the existence of Illinois Territory began—see *post* 5. This was not an enactment *giving* force in Illinois to the Indiana laws; it was a formal resolution that no such enactment was necessary. There were only thirty-four laws of the first grade of government.

What is to be said of the pronouncement of the first representative legislature which in this volume is printed as a "law" of Dec. 13, 1812?—*post* 51. That instrument is in form an enactment or law. It consists of two sections. By one section all laws of Indiana Territory in force therein on the day Illinois Territory was severed therefrom, and which had not been repealed by the governor and judges of the latter territory, "are hereby *declared to be* in full force" until altered in the future. By the second section all laws passed by the governor and judges for Illinois Territory are likewise "declared to be in full force" until altered in the future. Now, what were these provisions? Were they merely authoritative *declarations of existing facts* (not merely a tentative opinion of fact as in 1809), or did they *create* the facts by the pronouncement? Is it not perfectly clear that the Supreme Court of the Territory must have found the facts to be as stated even if no such instrument as this one of Dec. 13, 1812 had been in the records of the Territory? Surely there is no difference other than irrelevancies of form between the pronouncements of 1809 and 1812. Neither one was a creation of law; neither one altered the law.

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Territory, each as erected was given the laws of the parent territory until modified by the legislature of the new.¹⁶⁵

There had been earlier examples of this practice,¹⁶⁶ and there were a few also in later times—including that of Oklahoma, the last of the continental territories.¹⁶⁷ But it was never a basic principle, systematically followed, of the territorial system. There were also various acts which provided for neither extension of laws nor preservation of suits but which did contain a provision empowering the governor to appoint "township, district, and county officers" to hold office until the end of the first legislative assembly—usually, in the later period of these acts, a relatively short time; and to lay out "districts" for the election of members of the assembly.¹⁶⁸ These

¹⁶⁵ Wisconsin was given Michigan law by sec. 12 of act of April 20, 1836—*U. S. Stat. at Large*, 5: 10, 15; Iowa and Minnesota were both given Wisconsin law by sec. 12 of laws of June 12, 1838 and of March 3, 1849—*ibid.* 5: 235, 239 and 9: 403, 407 respectively. In the latter case Wisconsin law was extended as it existed when admitted to statehood in 1848. In the cases of all three of these territories, in addition to the extension of *laws* by sec. 12 of each organic act, provision was made by sec. 15 for the preservation and final determination of all legal proceedings pending at the moment the creation of the new territory became effective.

¹⁶⁶ It had been tried earlier in the cases of Alabama, created out of Mississippi Territory—sec. 2 of act of March 3, 1817, *ibid.* 3: 371, 372; also in the case of Arkansas, created out of Missouri—sec. 10 of act of March 2, 1819, *ibid.* 3: 493, 495. In the last case only, of the five referred to in this and the preceding note, was the extension limited to such laws as were "applicable." Practically, of course, this was not important. The Alabama organic act also contained the provision for preservation of judicial proceedings—sec. 7, p. 373; the Arkansas act did not.

¹⁶⁷ Oregon presented a special case; its organic act (1848) provided for the preservation of legal proceedings initiated under its earlier "provisional government"—sec. 17, *ibid.* 9: 329. Of thirteen territories later created, only the organic act of Washington, created out of Oregon Territory, provided for the continuance of the legislation of the parent territory (sec. 12) and preservation of suits (sec. 15)—act of March 2, 1853, *ibid.* 10: 177, 178. Arizona, created out of New Mexico, started with the latter's laws—sec. 2 of act of Feb. 24, 1863, *ibid.* 12: 665. Wyoming, created out of Dakota, took her laws—sec. 17 of act of June 25, 1868, *ibid.* 15: 183; and various selected Nebraska laws were for some reason given to Oklahoma Territory—sec. 11 of act of May 2, 1890, *ibid.* 26: 87. In the cases of Utah (1850), New Mexico (1850), Nebraska and Kansas (1854), Colorado (1861), Nevada (1861), Dakota (1861), Idaho (1863), and Montana (1864) there was neither provision for extension of laws nor for preservation of suits.

¹⁶⁸ This clause seems to have originated with Minnesota, sec. 7 of act of March 3, 1849—*ibid.* 9: 405. It was evidently considered by the Committee on Territories, in one or both houses of Congress, as of basic importance, for it was reproduced even to the number of the section in the organic acts of eleven other territories: New Mexico, sec. 8 of act of Sept. 9, 1850—*ibid.* 9: 449; Utah, secs. 4, 7 of act of same date—*ibid.* 454; Nebraska and Kansas, secs. 7, 25 of act of May 30, 1854—*ibid.* 279, 286; Colorado, sec. 7

acts assume, naturally enough, a continuance of the ordinary political subdivisions of an American state.

That Congress never adopted as a general principle the conferment on new territories of ready-made laws of older territories or states is not particularly important. By the mid-1800's statute books were readily available, and it could be safely left to the first territorial assembly to make the choice of models desired by its members. That choice was usually, and naturally, the laws of an adjoining state or territory.¹⁶⁹

(3) THE LEGALITY OF IMPERFECTLY ADOPTED LAWS.

It remains to consider the legal status of territorial "adopted" statutes. This involves, on one hand, consideration of judicial decisions as to the legal sufficiency or insufficiency of what was practiced as "adoption";—the question of congressional disapproval having been already thoroughly considered.¹⁷⁰ It also involves consideration of the legal character of what the governor and judges enacted as laws satisfying the Ordinance's adoption requirement, *pending* their approval or disapproval by the courts or by Congress.

There were seemingly no decisions by the territorial courts on the sufficiency of the legislative procedure. All the judges being legislators—and a majority of them being almost always parties to the enactment of each law—it would scarcely have been worth while to try the question before them. As a matter of fact there seems to be no evidence that any reputable lawyer, without financial interest and beyond the influences of local politics, would have counseled a contest of their validity.¹⁷¹ But the legality of some statutes was ultimately challenged in state courts, and all the actions of the legislators

of act of Feb. 28, 1861—*ibid.* 12: 174; Nevada, sec. 7 of act of March 2, 1861—*ibid.* 212; Dakota, sec. 7 of act of March 2, 1861—*ibid.* 241; Idaho, sec. 7 of act of March 3, 1863—*ibid.* 811; Montana, sec. 7 of act of May 26, 1864—*ibid.* 13: 88; Wyoming, sec. 7 of act of June 25, 1869—*ibid.* 15: 180; Oklahoma, sec. 7 of act of May 2, 1890—*ibid.* 26: 85. It was not, however, present in the organic act of Oregon—in which, presumably, the matter was provided for by acts of the foregoing "provisional government"—*ibid.* 9: 323; nor in the acts for Washington (*ibid.* 10: 172) and Arizona (*ibid.* 12: 664).

¹⁶⁹ Compare F. N. Thorpe, *A Constitutional History of the American People*, 2: 400-401 and index s.v. "Constitutional Conventions—Membership and Personnel."

¹⁷⁰ *Ante* cccxxxi seq.

¹⁷¹ See quotation from Jacob Burnet, *post* n. 182.

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were held to have been legal and effective. The governor and judges of Michigan Territory, for example, chartered in 1817 a bank under a law which purported to have been adopted.¹⁷² from New York, Ohio, and Massachusetts. A part of the statute was taken from each, and no one of the adopted laws was adopted *in toto*; Ohio was not a state in 1787; the pertinent laws of New York and Massachusetts were passed after 1787; many changes had been made in the verbiage of the laws adopted. A New York court, in an action on a promissory note payable to the bank, held that it was indeed a corporation legally created, and could maintain the action.¹⁷³ This case covered nearly all the irregularities which had caused anguish to Governor St. Clair and the enemies of Winthrop Sargent. The decision rested on the conclusion that the adoption requirement "was designed to secure to the people of the territories . . . a system of laws, each of which had been tried and approved of by the people of some one of the states"; or as another of the judges said, the purpose was to put the territorial government "under all the limitations imposed on the original states, contained in the constitution of the U. States, without enumerating them." And those would be satisfied by requiring merely that "the subject of enactment by the original states must be adopted."¹⁷⁴

¹⁷² The usual adoption formula in Michigan laws was substantially this: "the same being adopted from the laws of ——— [or: from (number) of the original states, to-wit the states of ———] as far as necessary and suitable to the circumstances of the territory of Michigan."

¹⁷³ *Bank of Michigan v. Williams* (1830), 5 Wend. (N.Y.) 478—particularly at 546-47, 550-52, and *post* ccccxlii *seq.*

In 1806 a Bank of Detroit had been incorporated for 101 years, with a capitalization of \$1,000,000. This law was disapproved by Congress on March 3, 1807—*U. S. Stat. at Large*, 2: 444. There is a letter from Judge Woodward regarding this earlier bank from which it appears that he aimed to overcome one special objection to territorial incorporation by the argument that it was "well understood that this act is at any time repealable at the pleasure of the legislative power of the United States," and he enclosed to the Secretary of State two suggested drafts of laws which Congress might enact—one making the Michigan act, alone, repealable, the other making all territorial incorporation acts repealable—letter of Jan. 31, 1807, *Mich. Pioneer and Hist. Soc. Collections*, 31: 589, 591. See *post* ccccxliii. On the *power* to incorporate he wrote: "If it is thought, in that medley of opinion which exists relative to the powers of territorial governments . . . that this government has not a *power of adopting laws of this description*, I am . . . silent"—*ibid.* 588.

¹⁷⁴ Judge Sutherland in the Supreme Court, 5 Wend. (N.Y.) 485; Senator Beardsley in the Court for Correction of Errors, 7 *ibid.* 557; and Senator Allen in the same, *ibid.* 546.

In my introduction to *The Laws of Indiana Territory* (*I.H.C.* 21), I

As respects the legal status of laws adopted by the governor and judges, the Ordinance provided that they should "be in force . . . until the organization of the general assembly therein, unless disapproved by Congress." The word "disapproved" was always interpreted to mean "annulled."¹⁷⁵ The Ordinance was merely "extended" to the Southwest and Mississippi territories, but the act organizing Orleans Territory and the District of Louisiana was original legislation and in that the phrases used were: "if disapproved of by Congress, shall thenceforth be of no force," and "shall thenceforth cease, and be of no effect."¹⁷⁶ And so of the second act relating to the Louisiana (Missouri) Territory.¹⁷⁷ It will also be remembered that because of the positive form of the Ordinance's provision it was felt necessary to provide specifically that the governor and judges might *repeal* their enactments¹⁷⁸—still leaving alterations by amendment to implication.¹⁷⁹ And we have also seen that although St. Clair and a few other responsible persons

remarked of the law of 1795 by which the English law was purportedly adopted as the basic law of the Northwest Territory, that if for the reasons earlier stated (*ante* n. 77) that law was invalid, the point would be "of little moment, for there were various other state statutes adoptive of the English law that could have been chosen" for the same purpose—*ibid.* ci. This of course rests on the liberal principles adopted by the New York judges. The subject matter had been approved by various states, and the law was not in conflict with the political purposes of the Confederation, approved by the new Union. But I would be quite willing to state my view as Mr. Blume interpreted it: "If the governor and judges in attempting to adopt a law that did not exist, happened to adopt one that did exist, their act was valid." And I am gratified by Mr. Blume's concurrence—*Supreme Court of Michigan Territory*, 1: xv. The New York judges held that laws adopted need not have been in existence in 1787. In dictum, however, some of the judges went further than my proposition. Assuming that the law adopted must have been in force in 1787, Senator Allen said there was then New York's Bank of North America, and the law creating that (1787) authorized the subject matter of the Michigan act—7 Wend. (N.Y.) at 547. Senator Beardsley was also seemingly of the same opinion, since banks existed in 1787 in Massachusetts, Pennsylvania, and Delaware, in addition to the Bank of America—*ibid.* at 550, 552.

¹⁷⁵ One curious disregard of this fact is pointed out in Philbrick, *Laws of Indiana Territory* (I.H.C. 21), civ n. 2.

¹⁷⁶ Secs. 4 and 12 of the act of March 26, 1804—Carter, *Territorial Papers*, 9: 204, 211. The act of March 2, 1805 ended such legislation in Orleans Territory—*ibid.* 406.

¹⁷⁷ Act of March 3, 1805—*ibid.* 13: 93.

¹⁷⁸ *Ante* at notecall 86.

¹⁷⁹ One obscure passage in Judge Woodward's statement of the Michigan procedure to the Secretary of State in 1806 (*ante* n. 73) may be an argument that a power to repeal included a power to amend—Mich. Pioneer and Hist. Soc. *Collections*, 31: 563. It seems easy to imply the power independently.

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doubted the legality of many territorial laws,¹⁸⁰ and various persons for political purposes *charged* their illegality, no nonterritorial court before which the question came ever countenanced that view.

Congress annulled only two laws in early days.¹⁸¹ Is there any reason whatever to regard any law not annulled as other than entirely valid? No approval by Congress was required to *make* the enactments of the governor and judges law; there was no provision for the approval or assent of Congress; to assume the necessity of such action *or even its possibility* is to alter completely the legal situation. The Ordinance provided only that a disapproval of territorial laws should *annul* them. Even if the Ordinance had not thus, by plain implication, recognized them as *existing laws*, they would nevertheless—as the actions of regularly constituted authorities—have been entitled to recognition and enforcement *as such* until annulled by Congress or by a court of competent jurisdiction. But no annulment of them by conclusive judicial decision that they were unconstitutional—as violating the congressional statute which was in effect the territorial constitution—could have been effected by other than a suit in a federal court and appeal to the federal Supreme Court (to which no appeal lay from the territorial court), and no such suit was ever brought.

Various historians have said, in the following or equivalent words, that “since these measures were not formally disallowed by Congress”—since Congress “merely withheld their assent, without expressing an actual dissent”—the laws were “enforced” or “treated” as or “as if” constitutional and valid. Probably all these statements are in part an echo of Judge Burnet, who gave as one reason why the legality of the adoption procedure was never tested in court, that “Congress had merely withheld their assent, without expressing actual dissent.”¹⁸²

¹⁸⁰ Edmund Randolph is the only other person whose position (seemingly clear of politics) has been noted by me.

¹⁸¹ One from the Northwest Territory—*ante* at notecall 86; none from the Mississippi Territory—*ante* at notecalls 87, 88 and following notecall 129; one from Michigan Territory—*ante* n. 173.

¹⁸² “According to their”—the legislators’—“construction [of “adoption”] . . . the limitation imposed on their discretion was entirely useless. The propriety of their course was frequently questioned by the bar, and a disposition existed to test it. No attempt, however, was made for that purpose, in consequence, probably, of the fact that Congress had merely withheld their assent, and that as the validity of the laws be decided by the same

In addition to that irrelevance—and, indeed, coming from a lawyer, absurdity—all such comments as those above assume that the word “adopt” had precise and narrow meaning. That the history of the Ordinance gives no support for such an assumption seems clear.¹⁸³ That no justification for it can be found in the political situation of the territories is much clearer. A literal construction of the word, everybody everywhere agreed, would have made any legislation utterly impossible. The only question is, therefore, whether after limiting the legislators’ discretion by requiring them to “adopt” it was either feasible or desirable further to limit their discretion. It seems likely that to a reader who ponders the liberties taken by the legislators with model statutes only one is likely to appear excessive; namely the borrowing of but a small—sometimes an exceedingly small—part of the original statute. Yet this would not have been done if it could have been avoided; it was obviously done only because of the particular importance and rarity of what was taken. No mechanical test of its reasonableness is possible; only a political test can properly be applied.

The test applied by the Michigan legislators in 1806¹⁸⁴ and by the New York court in 1830 was political and identical: that whatever be adopted must be consistent with republican constitutional principles, and therefore must have been approved by a state or states of the Union. A great amount of evidence discussed in a preceding section of this introduction strongly supports the conclusion that such was in truth the intent of the Ordinance’s framers.¹⁸⁵ Its requirement was that the governor and judges should “adopt . . . such laws of the original states as may be *necessary* and *best suited to the circumstances* of” the Territory. The interpretation of this provision, whether by the New York court or by historians, called for a reasonable judgment upon precisely the same facts. That historians have uniformly expressed a judgment contrary to the court’s is doubt-

men who passed them, the hope of a successful result was too weak to justify the undertaking”—Jacob Burnet, *Notes on the Early Settlement of the North-Western Territory*, 64. Mr. Burnet, a very active and prominent practitioner in these early years, was later a member of the Supreme Court of Ohio.

¹⁸³ *Ante* cccc-cccccii.

¹⁸⁴ *Ante* at notecall 79.

¹⁸⁵ In order to fall within the general objectives of the framers—*ante* cccxiv-vi, cccxiv-vii.

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less due to their freedom from the court's sense of responsibility in appraising the facts.¹⁸⁶ But the writer's view is that, aside from such considerations, there was full justification for the acts of the legislators who, in the words of the Michigan formula, adopted "*from the laws of the original states . . . as far as necessary and suitable to the circumstances of the territory.*"

When the first grade of territorial government ended, the adoption clause and the reference to disapproval by Congress disappeared.¹⁸⁷ That, however, made no difference whatever in the status of territorial enactments or the power of Congress. In omitting the adoption clause from the District of Louisiana act of 1804 Congress retained the provision that the territorial laws if disapproved by Congress should "thenceforth cease, and be of no effect." It also provided that no law should be valid if inconsistent with the Constitution "and" (*i.e.* or) laws of the United States.¹⁸⁸ But although these two provisions were often repeated in later laws creating other territories it was, of course, quite unnecessary to state them. With or without either or both of those provisions, the situation was always quite the same.

With that fact in mind let us now return to the idea that Congress might have "assented" to the laws. Had the Confederation continued, the sovereign states could, through Congress by special action, have done that in the sense of making the assent a compact,

¹⁸⁶ The court had before it a promissory note. It was necessarily conscious that title to vast amounts of property, the legality of public records, the legitimacy of every marriage in the Territory, and of every act of its township and county officials, depended on its laws. No court would upset the entire social structure of a community by a narrow interpretation of one word in a grant of legislative power. As already remarked (*ante* n. 107 and n. 91) it is extraordinary that Governor St. Clair did not feel more strongly that responsibility. There is no evidence that Edmund Randolph publicly questioned the validity of the laws when attorney general or when secretary of state (*ante* n. 91). There is no evidence known to me that St. Clair did so; but he did agitate the matter officially, and it is easily possible that his views became known in Congress. Of course the essential *facts* were known in the Territory after publication of the legislative journal of 1795 (*ante* ccccxvi). Republican politicians there or in Congress would have been quick to welcome such Federalist support.

¹⁸⁷ It recurred in the organic acts of Minnesota (1849)—*U. S. Stat. at Large*, 9: 405 (sec. 6); Utah and New Mexico (1850)—*ibid.* 455 (sec. 6), 449 (sec. 7); and Washington (1853)—*ibid.* 10: 175 (sec. 6). This was its last appearance.

¹⁸⁸ Sec. 12—Carter, *Territorial Papers*, 9: 210. It was also in sec. 4, with reference to the Territory of Orleans, for one year.

positively final. Under the present Constitution there would seem to be no possibility of doing that. We have seen in an earlier section of this introduction the utter emptiness of the idea that the Ordinance contained any provision of force above that of ordinary legislation.¹⁸⁹ Congress did by that enactment declare rights which the territorial government could not deny or abridge, but Congress could have withdrawn or amended those rights at any moment under its absolute constitutional power to make rules and regulations for the territories. They are subject to the sovereignty of the Union, and Congress cannot by any act qualify that power—which normally would (and possibly must) be exercised through the legislative department.

There would therefore seem to be nothing defensible in the idea that a territorial law could somehow and at some time acquire a final validity by a failure of Congress to *disapprove* it. It is true that Chancellor Walworth, in joining in the affirmance by the Court for Correction of Errors of the lower court's decision in *Bank of Michigan v. Williams*, gave as a reason for so doing the fact that Congress had for fourteen years failed to disapprove the law. That he regarded this, however, as merely evidence that Congress was unlikely to annul the law—not that the law had become irrevocable—is plain from his second reason for affirmance; namely, that a judicial pronouncement of the law's invalidity by a state court would be futile because it would not bind the territorial court.¹⁹⁰ It is also true that Chief Justice Chase, in dealing in 1871 with a Utah law of 1859, declared that "the law has received the implied sanction of Congress"; and he gave other good reasons, of a historical nature, for a belief that acts of the general nature of the Utah act had over a course of many years been approved, tacitly, by Congress.¹⁹¹ Had this meant only what was literally said—namely, that Congress had seemingly "approved" for twelve years of the law; or even if it meant that Congress had actually approved of the law, for twelve or any other term of years—it might be true, but it would be unimportant. But when understood, as Chief Justice Chase employed it, as a bar to a subsequent judicial pronouncement of the law's unconstitutionality (or to congressional invalidation), it was unsound. It seems clear from

¹⁸⁹ *Ante*, Section III, *passim*.

¹⁹⁰ *Williams v Bank of Michigan* (1831), 7 Wend. (N.Y.) 539, 543-44.

¹⁹¹ *Clinton v. Englebrecht* (1871), 80 U.S. (13 Wall.) 434, 445-46.

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later cases that the Supreme Court supports the view that the United States cannot be *bound* by the inaction or misjudgment of Congress in failing to disapprove a territorial law, although its attitude may possibly be recognized as creating equities that will affect the discretionary exercise of the sovereign power later to annul laws, or to prohibit or restrict legislation upon particular subjects.¹⁹²

Before the Civil War the power of annulling laws was exercised in only a very few cases of acts incorporating institutions with banking privileges.¹⁹³ In the same period a prohibition of such corporation laws, and of borrowing money on public credit were imposed upon three territories.¹⁹⁴ During and after the Civil War some territories were allowed to expend money only for purposes approved and within sums appropriated by Congress.¹⁹⁵ General statutes prohibited the granting by territories of private charters or especial privileges, and restricted the fields within which general corporation laws were permitted.¹⁹⁶ It is also a curious fact that during this period there were various cases in which Congress explicitly ratified or validated defective territorial laws.¹⁹⁷ In the single case of Utah was the absolute power of Congress fully displayed—in annulling various laws, and in subjecting to complete national control the validation of marriages, the laws of inheritance, the administration of the

¹⁹² Particularly *Springer v. Government of the Philippine Islands* (1928), 277 U.S. 189, 209. Mr. Blume has discussed these cases; see his *Supreme Court of Michigan Territory*, 1: xxx-xxxi. In Judge Cooley's work—T. M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* (6th ed. 1890), 37 n. 1—he cited the older cases (of which only *Williams v. Bank of Michigan* involved an "adoption" statute) under the head: "Power to legislate assumed, if suffered to remain without disapproval for years."

¹⁹³ Three laws of Florida, annulled by an act of 1836—see M. Farrand, *Legislation for the Territories*, 41.

¹⁹⁴ On Florida by the act just cited; on Oregon and Washington by their organic acts of 1848 and 1853 respectively—*ibid.* 42-43. An indirect control over legislative activity was imposed by a law of 1842 limiting the costs of any legislative session to the sum appropriated therefor by Congress—*ibid.* 42.

¹⁹⁵ Idaho and Montana—*ibid.* 79, 78.

¹⁹⁶ *Ibid.* 47-79. In this period indirect control of territorial legislation was exercised to a greater extent than in the earlier period by statutes limiting the length of legislative sessions in all territories, limiting the cost of printing bills, fixing the compensation of members and officers of the legislature, and forbidding extraordinary sessions unless reasons for them were approved by the president—*ibid.* 46-47.

¹⁹⁷ Acts of the Territory of New Mexico creating a county and another for issuing bonds; laws of Dakota Territory incorporating insurance companies; and ten laws of Washington Territory—*ibid.* 88, 89, 90.

probate courts, qualifications for voting and holding office, the procedures of registration of electors, and elections.¹⁹⁸ It is really only in the incidents of the Utah case that one can discern any justification for the absolute powers given Congress over the territories. In all other cases one sees at most a steady hand in minor governmental ills.

The Legislative Quorum and Majority.

The original journal of Congress showed the final text of the Ordinance as reading: "The governor, and judges or a majority of them shall adopt . . . laws." But the official printed copies which were first used in the Northwest Territory read: "The governor and judges, or a majority of them, shall adopt . . . laws." And, what is more, Dr. Carter tells us that "the printed texts of the ordinance from 1787 to the present time have universally followed the version of the first official printed copy."¹⁹⁹ So, for example, despite the controversies between Governor St. Clair and the first judges of the Northwest Territory, settled in his favor by Secretary Charles Thomson's report on the correct reading of the original journal of Congress,²⁰⁰ the Ordinance as republished in the laws of the Territory always repeated the false reading.²⁰¹ And Dr. Carter's statement would justify a conclusion that if the same problems arose in other territories either an erroneous course was followed, based on the false printing, or if a correct course was adopted—as it probably always was in theory, though a governor might choose not to assert his legal rights on all occasions—this was contradictory of the law as known to the public.²⁰² And since there would be under either supposition an undesirable situation, this is another case in which it would seem that the federal administration should have acted to prevent misunderstandings.

¹⁹⁸ *Ibid.* 49, 90, 92.

¹⁹⁹ Carter, *Territorial Papers*. 2: 42 n. 14.

²⁰⁰ Letter of March 11, 1789—*ibid.* 190.

²⁰¹ For example, in the Northwest Territory in 1796 with laws of 1795, and again with laws of 1799—T. C. Pease, *Laws of the Northwest Territory* (*I.H.C.* 17), 124, 522.

²⁰² "That the Journal itself may have been in error is not impossible, since in all the drafts from that of April 26, 1787, the punctuation is the same as found in the official printed copy issued after final passage. . . . Nevertheless the Journal is the final authority; we cannot go behind it"—Carter, as in n. 199 above.

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Assuming the correct reading of the original journal, it would logically follow that the governor must always concur in the passage of a law. From this, two conclusions would follow: one, that he therefore had a veto, when present; the other, that no matter what the number of judges present there could be no legislative quorum without his presence. The first of these conclusions was not accepted with unanimity in the different territories. The second was not acted on at all in the one territory where the quorum problem seems to have been important. The two matters may be considered separately.

The quorum problem led in Michigan to collisions between the executive and judicial departments which were of most serious nature, and to a paralysis of territorial administration hardly to be paralleled in any other territory. Long after the troubles between Governor Hull and the Chief Judge, Augustus B. Woodward, had begun—indeed, when they were at their climax of bitterness—the latter bridled at a notice of a legislative meeting sent by the Governor and signed by him: “President of the Legislative Board.” In his reply he conceded to the Governor no superior voice whatever and no right even to preside, though willing to concede the practice of presiding as a matter of courtesy. At the same time, reasoning from the official printed version of the Ordinance, he wrote (1810): “They, or a majority of them, shall adopt laws. . . . They are not made *a body*, they have no speaker, there is no definition of a quorum. The majority required is not *a majority of those present*, but *a majority of the whole*. Three signatures therefore, or the assent, in some shape, of three persons becomes indispensable . . . to any provision which is . . . to have the obligation of a law.”²⁰³ However, in 1806 Judge Woodward had reported to the Secretary of State that the Michigan legislators interpreted the Ordinance as creating “a kind of legislative board, composed of the Governor and the three Judges, any three of whom form a quorum, and of which quorum the votes of any two determine a question.”²⁰⁴ Now, it happened that in the so-called “Woodward’s Code” of 1805-1806 there had been at least three “laws” that in fact satisfied only the second rule stated by him; being actually approved by only the Governor and one judge, or by two judges only, of the

²⁰³ Letter of July 23, 1810 to Hull—*ibid.* 10: 321.

²⁰⁴ Letter of May 8, 1806—Mich. Pioneer and Hist. Soc. *Collections*, 31: 562.

three persons present.²⁰⁵ That is, he had in fact joined in giving to some laws in his Code the appearance of actual approval by three of the legislative "quartette" (if we avoid the words "legislature," "body," and "board" as Judge Woodward insisted—in 1810), when in fact only two approved. But the possibility of this was all he objected to in the Witherell Code. It could make no difference that the two judges were the only judges in service, for the Ordinance said nothing of vacancies and required a majority of four persons under the postulated printing (and would have required a majority of three judges under the true reading of the journal). However the fact that the laws were signed by three legislators would have caused approval by the signers to be conclusively presumed in all ordinary cases; that is, in cases in which validity of the law was not contested on the very ground of the lack of actual approval. At law, therefore, in all ordinary cases, the rule first stated would *seem* also to be satisfied, and the inconsistency between the two rules was evaded.

In the four years between the pronouncement of the two rules much had happened. In November 1808, when Judge Woodward was not in Michigan, an act was passed which declared the rule as stated by him in 1806, and then provided that in case of approval by either three of the four legislators, or by two in a quorum of three, the act should be signed by the officer presiding at the time of passage and attested by the secretary of the Territory.²⁰⁶ This and some forty other acts were authenticated by the signatures of the governor and secretary, with nothing to indicate which meaning of "majority" was satisfied in any particular case. They were all passed before Judge Woodward returned to the Territory, and many of the laws in the Woodward Code were repealed by them. After his return the validity of laws in this "Witherell Code" was tested in a series of nine cases.²⁰⁷ At least two were held *prima facie* valid when it hap-

²⁰⁵ *Ibid.* 563.

²⁰⁶ Nov. 9, 1808—quoted by Judge Woodward, W. W. Blume, *Supreme Court of Michigan Territory*, 1: 514-15. Note the law ended with the usual formula of adoption: "the Same being adopted from one of the original States, to wit, the State of Vermont, So far as necessary and Suitable to the Circumstances of the territory of Michigan";—although (1) surely, if those words were found they could not have referred in the Vermont law to a legislature, and (2) Vermont was not really an original state. The laws of the "Witherell Code" were passed between Nov. 9, 1808 and Feb. 26, 1809—compare Mich. Pioneer and Hist. Soc. *Collections*, 8: 593, 12: 613.

²⁰⁷ See Mr. Blume's citations—W. W. Blume, *Supreme Court of Michigan Territory*, 1: 165; also, xxv-xxvii.

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pened that they were supportable by a model law from an original state. But it was held that some of the laws were invalid; and in one that the parent law was void because no law of an original state from which it could have been adopted actually existed, and because it purported to effect "an essential change in the ordinance." In dictum the Court also declared that all the other laws authenticated under the authority of that law were void.²⁰⁸ This insistence by the Supreme Court upon the continuing validity of laws ostensibly repealed by the Code for which Governor Hull was responsible necessarily created great confusion in the public mind—and presumably rage in the Governor. In consequence, he issued a proclamation in which he proclaimed "to the people of this Territory" that no power on earth—save the Congress, which had reserved the right—had power to invalidate laws adopted and passed by the governor and judges; denounced the Supreme Court for its impropriety in characterizing as invalid laws whose validity was not directly in question in the proceedings before it; and then, as a climax, called upon every officer, "civil and military" of the Territory "to be vigilant in enforcing the laws," and upon "all good citizens to be firm and unanimous in obeying them." Forgetful of his criticism of the Court's action, the Governor—though not a higher court—also declared the Court's decisions nullities.²⁰⁹ Not long after this Judge Woodward issued a mandamus ordering the judge of an inferior court to probate a bill under a law of the Woodward Code which had purportedly been repealed by a law of the Witherell Code. The judge appeared and answered that he would rather die than obey.²¹⁰ Judge Woodward accused Governor Hull, because of the reference to the military in his proclamation, of threatening forceful compulsion of the Court. He refused to attend legislative sessions (of which, because of these disputes between the Hull and the Woodward partisans, there were none for nearly a year and a half) unless the Governor "annulled" his proclamation and a return was made to "the legitimate course of government," altered by the act of

²⁰⁸ McGarvin v. Wilson (1809), *ibid.* 180-82 and statement of its principle, 515.

²⁰⁹ *Ibid.* 2: 286-87.

²¹⁰ In the matter of Sibley and Hoffman, Executors (1810)—*ibid.* 1: 189-90 and citations there given, especially 513-17, 518; also 2: 299. Judge Woodward comments on this case and that cited *ante* n. 208 in the letter cited in n. 211.

November 1808.²¹¹ This last really called for no more than a repeal of that law respecting the legislative quorum, majority, and mode of authenticating laws. That parent law of the Witherell Code was, accordingly, first repealed, and after a fortnight Governor Hull joined in a repeal of all the other laws similarly authenticated. On the same day the district courts were abolished, thus breaking the deadlock between the Supreme Court and the district judge who had defied its authority and at the same time it was declared that the jurisdiction of that Court should extend to the probating of wills.²¹² Accordingly, the particular will over the probate of which the conflict had arisen was probated a few days later in the Supreme Court.²¹³ As Professor Blume says, "Here again, the governor and judges failed to realize"—or did they not, perhaps, merely ignore the fact?—"that they had no power to enlarge the jurisdiction of the court created by Congress."²¹⁴

It is obvious that the immediate and the primary cause of these fantastic and deplorable dissensions lay in the temperaments of the territorial officials—of the weak as well as the strong. In other territories there were judicial characters even more extraordinary in some ways than Judge Woodward, but perhaps there was none whose battle-fire was so much of principle and so little of personal passion, and none who combined such imagination and acuity in producing theories to entangle his opponents.

It is not intended to suggest that the Ordinance is open to criticism because not drafted with the phenomenal care that would have been required in order to exclude variant interpretations of its provision. It is only intended to make clear that here again the Ordinance merits no praise as a production of super-legislation.

The Governor's Powers of Veto and Prorogation.

It has already been mentioned that the Ordinance as recorded in the original journal of Congress gave legislative power to "the

²¹¹ Letter of Judge Woodward to Governor Hull, July 23, 1810—Mich. Pioneer and Hist. Soc. Collections, 36: 363-68.

²¹² See *ibid.* 8: 612-15 and 36: 368 n. 24.

²¹³ A very imperfect law of the Witherell Code which had created the district courts was one of those that had earlier been pronounced invalid by the Supreme Court. W. W. Blume, *Supreme Court of Michigan Territory*, 1: xxvii, lii-liii, 190, 539-40.

²¹⁴ *Ibid.* liii.

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governor, and judges or a majority of them"—which reading, since it required the governor to be always a party to legislative action, gave him a power to block any action by refusing to concur in, or by mere abstention from joining in, action by the judges. And although the printed copies supplied by the government to the officers of the Northwest Territory read quite differently—namely: "the governor and judges, or a majority of them"²¹⁵—Governor St. Clair always interpreted that phraseology, also, as meaning "the governor and any two of the judges."²¹⁶

Whether this power to thwart action should be called a power to "veto" legislation depends on the meaning that should be given to that word. It habitually implies action by a legislature that is an *independent* body, which action, being submitted to the executive, he either approves or refuses to approve it, giving his reasons in case of disapproval. Certainly the situation under the Ordinance did not exactly fit this description. Yet, as a matter of practical fact the use of the word "veto" seems permissible. Governor St. Clair may at first have expected the judges to act first, and submit to him the result of their labors,²¹⁷—which was the form in which Jefferson would have preferred to provide for legislation in the Territory of Orleans;²¹⁸ but the facts that few laws were available for consultation except those of Pennsylvania, and that he was very familiar with their operation, would naturally have led to the practice of sitting with the judges.²¹⁹ This seems to have been the general practice.²²⁰ St. Clair's practice of sending the judges "veto" messages, or letters

²¹⁵ See *ante* cccclvi.

²¹⁶ Letter to the judges, Aug. 2, 1788—Carter, *Territorial Papers*, 3: 274-75; letter to the President, Aug. 1789—*ibid.* 2: 206-7. In this last letter he remarked that if the judges had "attempted to establish" their construction (that is, doubtless, by promulgating a law in which he had not concurred) he "would have thought himself bound in Duty to have forbid Obedience by Proclamation until the Sense of Congress on the matter could be known, and the utmost Confusion must have ensued." See *ante* at note-call 209 for what actually happened in Michigan Territory in a case somewhat similar.

²¹⁷ Compare *ibid.* 2: 207 at bottom, 3: 268, 272.

²¹⁸ *Ante* n. 142.

²¹⁹ The journal of the sessions of 1795 shows this—*ante* nn. 100, 98.

²²⁰ Sargent so sat as acting governor in the Northwest Territory and governor of Mississippi Territory; Governor Hull of Michigan sat as "President of the Legislative Board," and Judge Woodward conceded the position as a matter of courtesy—*ante* cccclvii. Almost certainly it was everywhere the practice.

refusing to join in the adoption of particular laws,²²¹ was presumably adhered to only in the period before actual sittings with the judges became his practice.

The judges were, of course, never ready to accept the governor's claim of a veto.²²² As they said, a veto was not mentioned in the Ordinance, and its *words*—be the punctuation as it might—could not be stronger in putting the parties on an equality. That, too, was the attitude of all parties in Michigan where no veto power was claimed.²²³ William Henry Harrison, as governor of Indiana Territory, seems to have abstained completely from asserting a veto power during the period of government of the first stage.²²⁴ In Illinois Territory, also, there seem to have been no “vetoes” until after introduction of representative government, presumably because difficulties were either removed by discussion in legislative sessions or legislation abandoned when opinions were irreconcilable. It aroused, however, extreme resentment in the second stage of government.²²⁵

²²¹ Carter, *Territorial Papers*. 3: 266, 268 (reasons for refusing to join in adopting a law sent to him by the judges), 270; note also form of Acting Governor Sargent's action in 1790—*ibid.* 2: 304. It seems reasonable to assume that the absence of such messages in the volumes devoted to other territories has the same explanation.

²²² Compare St. Clair's report of their attitude in 1789—*ante* n. 216 with Sargent's report in 1793 of the attitude of later-named judges—*ibid.* 3: 400; also with the remarks by Judges Symmes and Turner in their reply to St. Clair's remarks in opening the legislative session of 1795—W. H. Smith, *St. Clair Papers*. 2: 365.

²²³ “In the Territory of Michigan the construction has been *unanimous*, that . . . the Governor is a component member of the legislative board . . . but that the other members may act without the Governor, and that their vote [may] carry a question against the [non-]concurrence of the Governor. On this account the laws are clothed with the signature of all the members of the government, whether unanimously passed or not”—letter of Judge A. B. Woodward to Secretary Madison, May 8, 1806—Mich. Pioneer and Hist. Soc. *Collections*. 8: 562.

²²⁴ But he had serious difficulty with it later, despite his tact for some years in avoiding any issue on the point with the General Assembly—Philbrick, *Laws of Indiana Territory* (*I.H.C.* 21), xxix-xxx; Carter, *Territorial Papers*, 8: 154. Governor Claiborne of Orleans Territory was similarly chary of exercising his veto power—*ibid.* 9: 642, 779.

²²⁵ In the Illinois State Archives there are loose papers concerning vetoes of the sessions of 1812, 1813, and 1814. One of those of 1814 (Dec. 21) is in the Record of the Council of Revision, vol. 1 (1809-1845)—MS, and if there were vetoes of 1815-1818 they are presumably there recorded, though my notes do not show this. A legislative memorial of 1813, forwarded to the President by Governor Edwards, was not found by Dr. Carter—*Territorial Papers*. 16: 378. A proposed memorial of 1814 was very strong in its denunciation of the veto power and the illiberality of territorial government, but it was rejected, Dec. 13, 1814—Journal of the House of Representatives (MS), 53, 81, 111.

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In the Louisiana-Missouri Territory the differences between Governor Wilkinson and the judges over the veto issue paralyzed legislative activity in the first stage of government, and bills were introduced in Congress to deal with the difficulties that had arisen there.²²⁶

It was sometimes alleged in popular petitions (and has been later repeated), that under the first stage of government there had been no veto, whereas under the second stage the voice of the representative legislature was subject to an absolute veto. This seeming paradox had, manifestly, no sound basis in fact.

We are here concerned with the obscurity of the Ordinance respecting the veto during the period of nonrepresentative government. That its existence or nonexistence was left to arguments over punctuation, and that the basis of affirmative argument required one to ignore a mistake of the secretary of Congress in copying its records, is another example of the Ordinance's egregious imperfections.

The worst thing about the governor's absolute veto was, however, that it was carried over into the stage of representative government. Here again the Ordinance displayed its total break with the Revolutionary tradition—which, in a majority of the state constitutions of the time, wholly deprived the governor of a veto on legislation. In this respect, therefore, the Ordinance anticipated the temporary reaction which was soon to set in against extreme post-Revolution radicalism. But that reaction in the states, where the people controlled, was only brief, whereas fifty years were to pass before the movement began to establish in the territories a qualified veto such as a minority of the state constitutions of the Revolutionary period had established.²²⁷

The governor's power of prorogation, since it related solely to government of the second stage, and was explicitly stated, also calls

²²⁶ Carter, *Territorial Papers*, 13: 270, 271. Note the wording of the act of March 3, 1805—"The legislative power shall be vested in the governor, and in three judges or a majority of them"—*ibid.* 93. Senator Worthington's bill of 1806 was intended, by compromises, to settle disputes both in the District of Louisiana and (*ante cccclvii seq.*) in Michigan—*ibid.* 420

²²⁷ By an act of March 3, 1839 the veto in Iowa and Wisconsin was made subject to being overridden by an adverse vote of two-thirds of each house—*U. S. Stat. at Large*, 5: 356. There had been occasional demands for such a rule since early days; the main objection to the veto, that it defeated popular desires, perhaps *implied* a petition for a qualified veto—compare, for example, Carter, *Territorial Papers*, 2: 502, 548.

for no particular comment here. It was sometimes a power much needed, as when circumstances made a meeting of the legislature at the appointed time impossible or highly undesirable,²²⁸ but was also at times used for political reasons, or as a weapon in factional struggles in a territory. In Mississippi, where the most serious difficulties arose, the violence of factional feeling against the governor coupled with a series of prorogations and dissolutions of the General Assembly, virtually deprived the Territory of effective government for nearly a year and a half.²²⁹ Whatever the purpose of its

²²⁸ Examples probably of this type are three prorogations by Governor Blount of the Southwest Territory—*ibid.* 4: 330, 462, 467 n. 82; one by Governor Claiborne in Orleans Territory—*ibid.* 9: 446; one by Governor Holmes in Mississippi Territory—*ibid.* 6: 399. Governor Claiborne, in another case, prorogued the legislature because a term of his governorship was to expire and he assumed either that this would terminate lawful action by the legislature or lawful co-operation by him with it in legislation—see *ibid.* 9: 457. Secretary Madison's opinion was negative on the former point, but he gave no opinion on the latter—*ibid.* 496. A similar case in Mississippi Territory is referred to in the next note.

²²⁹ In 1805 the Mississippi legislature sat for more than three months in making nominations for the Legislative Council and electing a delegate to Congress. According to Governor Williams the second was even then accomplished only after he threatened a dissolution. See *ibid.* 5: 381, 387, 616-17. Secretary Mead (ultimately dismissed from office) was acting governor of the same Territory most of 1806, and hostile to the Governor. Various bills passed by an Assembly shortly after the latter's return were vetoed by him—*ibid.* 529-30, 605. In Nov. 1807 the General Assembly again met—in advance of the statutory date for its session—by resolution of the two houses, and according to Governor Williams without his knowledge or consent—*ibid.* 575; according to George Poindexter (the Territory's delegate in Congress, and likewise one of the Governor's determined enemies), their purpose was "to enable them to forward their memorials, if any were thought necessary, to Congress so as to be acted on during the session, at which they were presented"—*ibid.* 608. The Governor vetoed various of their bills, seemingly without giving reasons, and after ten days prorogued them to the date for their regular session in December—*ibid.* 579, 581, 608. But after three weeks—the members representing to him that "through the indisposition of some of its Members and the absence of others no business of any importance to the Territory [was] yet done," and praying prorogation, he prorogued them for a few weeks—*ibid.* 587, 590, 591. In the course of this session the term of office of Governor Williams expired, and believing that he could no longer act lawfully before reappointment (which took place nine days later—*ibid.* 610 n. 17) he dissolved the Assembly—*ibid.* 614 and n. 25. This raised the question whether *dissolution* was effective in ending the existence of the Legislative Council, whose members were appointed by the President; the opinion of the President supported the Governor's opinion that it did—*ibid.* 617, 634-36 and n. 25. Another session was held in Sept. 1808, and after the Governor made known the President's approval of his position, persons were nominated for appointment to a new Council—*ibid.* 640-44. The next session, however, in March 1809, spent most of its time, in Governor Williams' opinion, "in litigating subjects of no public opinion, with which the Assembly [had] nothing to do, and such as

employment, a charge that its use was tyrannical was inevitable. Governor Harrison's political shrewdness—and in the writer's opinion his genuinely democratic sympathies—minimized its employment in Indiana Territory,²³⁰ and in Illinois Territory no controversies over it arose. The power was not included in the governmental plan specially devised in 1804 for the government of Orleans Territory, nor in the revised plan of 1805,²³¹ and though the District of Louisiana was subjected to it in 1804 by extension over it of the executive powers of the governor of Indiana Territory,²³² it seems very doubtful whether the power was continued by the act reorganizing the Territory's government the following year.²³³ It was omitted in 1812 from the organic act of the Territory.²³⁴ It was likewise omitted from the organic act of Florida Territory²³⁵—naturally mod-

[were] only Calculated to inflame the public mind and promote certain political & party purposes"; wherefore he resorted to another dissolution—*ibid.* 713, 724. (As a matter of fact Governor Williams approved eight laws and dissolved the Assembly after his term of office had expired, but the validity of his actions was never challenged—*ibid.* 714 n. 82, 6: 12.)

The original bill of 1800 advancing Mississippi Territory from government of the first to second stage contained a provision "designed to prevent" prorogation or dissolution of the General Assembly at pleasure, but the Senate struck it out—*ibid.* 5: 97 n. 21. This was because of resentment against Governor Sargent's allegedly tyrannical actions—*ante* cccxxii *seq.* As a result of the troubles of 1807 George Poindexter twice in 1808 offered a resolution in Congress for an inquiry into the expediency of repealing the Ordinance's provision empowering the governor to prorogue or dissolve a territorial "House of Representatives elected by the people." The motion was each time approved and Poindexter reported a bill, but the matter was indefinitely postponed. The postponement was on the motion of a Georgia representative who argued that Georgia's consent to a change was essential, since every provision of the Ordinance was part of a compact between that state and the Union, and that "the people" of the Northwest Territory must likewise consent—*Annals*, 1 Cong. 1 Sess. 1619, 1640; 10 Cong. 2 Sess. 487, 492, 501-9. (Although Poindexter was only a delegate he voted!—509.)

²³⁰ See Philbrick, *Laws of Indiana Territory* (I.H.C. 21), xxix-xxx; Carter, *Territorial Papers*, 7: 685-86; Jesse B. Thomas to John Messinger, Dec. 12, 1808—Ill. State Hist. Library: Messinger Papers.

²³¹ Acts of March 26, 1804 and March 2, 1805—Carter, *Territorial Papers*, 9: 202, 405.

²³² By the second para. of sec. 12 of the act of March 26, 1804—*ibid.* 210.

²³³ In other words I believe that the *limited* reference to the paragraph just cited, made in sec. 8 of the act of March 3, 1805 (*ibid.* 13: 94) should not be regarded as making the paragraph of 1804 as a whole, and for all purposes, "a part of the constitution of the new Territory of Louisiana," and understand Dr. Carter (*ibid.* 94 n. 64) to have thus referred to it only in the limited sense involved in the subject matter there before him.

²³⁴ Act of June 4, 1812 (sec. 4)—*U. S. Stat. at Large*, 2: 744.

²³⁵ Act of March 30, 1822 (sec. 5)—*ibid.* 3: 654. There was no mention of even a veto power; nor was this mentioned in the amending act of March 3, 1823—*ibid.* 750.

eled on that of Orleans. If not needed in territories of foreign antecedents it could not long have continued to be considered necessary in those of wholly native background, and it seems not to have appeared again.

*Obscurities and Controversies Arising from Concentration of
Governmental Powers.*

(1) IN GENERAL.

There is a bulky literature on the doctrine of division of powers and its history in this country. The matters to be here considered are only a footnote to that history. From our colonial experience we gained a conviction—which the experiment of the Confederation made sharply clear—that successful federalism must rest on a fuller and better division of governmental powers than that tried in the Articles of Confederation. The task of the framers of the Constitution was to insure a community of equal states and to guard against excessive power in the federal government to which they entrusted the protection of common interests. But permanence and smooth functioning were also essential to the federal government, and it was necessary to avoid in it the vices manifested in the state governments of the Revolutionary period, the chief of which was the virtual omnipotence of the legislature. This was done by forbidding outright the legislation in favor of debtors which more than anything else had discredited the state legislatures of the period, and—beyond that—by a resort to the plan of checks and balances. Some of these were provided by giving the executive a qualified veto (as in a minority of the state constitutions of the day) upon legislative acts; giving the judiciary the further power of invalidating laws conflicting with the Constitution;²³⁶ permitting the executive and the Senate to join in selecting the judiciary; granting to the judges tenure during good behavior; and making them subject to impeachment by the Senate.

The rights we desired within the British colonial empire would have made it a federal system. As Professor McLaughlin repeatedly

²³⁶ The writer accepts the view that such was the intent of the framers—see C. A. Beard, *The Supreme Court and the Constitution* (1912). Note Hamilton in *The Federalist*, Nos. 78, 81.

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pointed out, John Dickinson was dimly conscious of the fact and of the principles involved,²³⁷ but Great Britain was not yet ready for changes that ultimately created the British Commonwealth of Nations. When Americans created their own colonial system they utterly ignored, save for one great democratic principle to which the states were committed by compact long before the Ordinance was drafted,²³⁸ their Revolutionary preachments and their theories respecting the distribution of governmental powers. The governmental plan of the Ordinance created a system in which the political rights of citizens were extremely limited both in number and content. It was also one completely dominated by an extraordinarily centralized executive authority. But since it also provided liberally for the existence and protection of personal liberties, it cannot be said that it authorized a government that was potentially tyrannical. Autocratic and potentially capricious it might be—and under Governor St. Clair in some respects actually was; but it could not be worse than that.

The incongruity of making the governor and judges the territorial legislature was no greater as respected them than as respected him. It was, of course, patently undesirable that the judges should frame laws which they would later be required to construe, or upon the validity of which under the Ordinance they might be compelled to rule. The impropriety was apparent to them and to Governor St. Clair, but—like other undesirable features of the judicial system²³⁹—was excused on the ground of necessity;²⁴⁰ that is, by the poverty of both the Territory and the federal government, neither of which could afford to support an independent legislature. With the executive and judiciary thus united as a legislature, and remembering that

²³⁷ See *ante* cvi-vii; A. C. McLaughlin, "The Background of American Federalism" (1918), *American Political Science Review*, 12: 225-26, 220-21, 238; A. V. Dicey, *The Law of the Constitution* (6th ed. 1902), ch. 3. And see quotation from Dickinson, *ante* n. 18.

²³⁸ *Ante* cccxiv-xvi.

²³⁹ *Ante* xxi, xxviii.

²⁴⁰ St. Clair to Judges Parsons and Varnum, Aug. 2, 1788—Carter, *Territorial Papers*, 3: 274, W. H. Smith, *St. Clair Papers*, 2: 359; answer of Judges Symmes and Turner to address of Governor St. Clair on May 25, 1795—*ibid.*, 369. An act of 1734 in New York had denied judges the right of membership in the legislature. The service of the judges of the Supreme Court as a council of revision created by the Illinois constitution of 1818 was found undesirable and abandoned. Note in the Illinois constitution of 1818 the exclusion of judges, clerks of court, and many other officials from the legislature. This marked approval of the doctrine of separation of powers, but had no special local significance.

the judges were not especially competent, it is easy to understand how Judge Turner—who merely felt that it was a judge's duty to enforce the law—forgot in the Illinois Country in 1795 that at common law a judge can only do that retrospectively after a violation, by punishing or awarding damages in proceedings initiated through other agencies. The Governor properly admonished him that his office was “neither inquisitorial nor executive,”²⁴¹ but in declaring that the executive and judicial authority were “quite distinct” he ignored the fact that however clear might be to him the line drawn between them by the Ordinance it was not identical with the line drawn by history and generally recognized. We shall see that some executive encroachments sanctioned by the Ordinance were in some territories renounced by the governors, while in others they were bitterly contested by the judges.

Various members of the last Continental Congress were also members of the Federal Convention, and participated in its work of framing a constitution designed with logic and wisdom to accomplish definite ends. Early commentaries on the Ordinance eulogized it as contrived by political scientists equally striving to draft an ideal government for infant republican communities. It was rather a product of forthright political reactionaries, determined to control an assumedly untrustworthy (and potentially revolutionary and traitorous) population, such as had long settled the inland frontiers of the various colonies and sought impertinently either to be left alone or be conceded equal representation in the colonial legislatures.²⁴² Its framers were logical—and, in view of their attitudes toward frontier society, not hypocritical. That does not alter the fact that the Ordinance was, in its day, completely out of the main current of the country's political thought. It was a revolt against legislative absolutism, an equally extreme example of executive absolutism set up for a deliberate purpose. But doctrines change with changing circumstances. Today—when the justice of administrative tribunals and agencies of government illustrate, with many other things, impatience with the doctrine of distributed power—the Ordinance has a renewed interest in connection with the devel-

²⁴¹ St. Clair to Judge Turner, May 2, 1795—Carter, *Territorial Papers*, 2: 513; to Secretary of State, May 4—*ibid.* 518.

²⁴² *Ante* cccxlvii-viii, cccvi-vii, cccxxii *seq.*

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opment of what Simon Baldwin called "absolute power, an American institution."²⁴³

(2) CONCENTRATION NECESSARILY CAUSED OBSCURITIES.

When power is so greatly concentrated as it was by the Ordinance, and varieties of power so little distinguished, obscurities are inevitable. Judges Symmes and Turner justifiably wrote to Acting Governor Sargent in 1790: "The ordinance . . . is silent on many points with respect to the powers and duties of the principal officers."²⁴⁴ The differences which arose from this cause between governors and secretaries of early territories have already been noted.²⁴⁵ The question has also appeared whether the governor, secretary of state, or even the president could compel a judge to return to his territory for the performance of either judicial or legislative duties.²⁴⁶ And it has been seen that the collection of license and passport fees by Governor Sargent, in Mississippi, following the practice of Governor St. Clair in the Northwest Territory, was one of the main charges upon which his enemies based their demand for his removal from office.²⁴⁷ Some other points were the subject of contention in the Northwest Territory, others elsewhere. Together, they amply illustrate the accuracy of the above-quoted assertion by the judges in 1790.

(a) GOVERNMENT BY PROCLAMATION.

The military background of the officers of several territories was visibly of some influence in blurring the distinctions between different governmental powers. This was markedly true in the Northwest Territory and in Mississippi. Mr. Pease noted the army mind displayed in some of the early laws, and of one or two that were denunciatory of evil conduct but prescribed no penalties therefor he acutely remarked that "a person with military experience would say that in phraseology they were general orders rather than laws."²⁴⁸ Almost unlimited civil authority and command of the

²⁴³ S. E. Baldwin, *Modern Political Institutions* (1918), ch. 4.

²⁴⁴ Carter, *Territorial Papers*, 2: 304.

²⁴⁵ *Ante* cccxciii *seq.*

²⁴⁶ *Ante* xxix-xxxi and n. 64.

²⁴⁷ *Ante* cccxxiv *seq.*

²⁴⁸ T. C. Pease, *Laws of the Northwest Territory* (I.H.C. 17), xix, xx.

militia were united in the governor. Other executives must have felt at times as did Secretary John Gibson of Indiana Territory, a bluff old soldier, who at a time of threatened Indian troubles instructed a captain of rangers, "This territory is under no law that can force obedience but the Military and all of its subjects must obey the governing rule or be sent out of it."²⁴⁹ It is extremely creditable to them, if they did at times feel so, that no evidence of it was manifested in their acts, no matter how low an opinion some of them held of their frontier "subjects," and no matter how clearly they may have realized, as did St. Clair,²⁵⁰ that they were ruling colonies that were no part of the Union.

Action was sometimes taken, however—provoked by emergencies when normal administrative processes were impossible—which was occasionally a harmless manifestation of military instincts, and at other times of the most serious possible character. It might be called government by proclamation.

Governor St. Clair, in 1789, was ready to order by proclamation disobedience to laws if promulgated as such by the judges despite his dissent.²⁵¹ Certain county judges having originally been commissioned during good behavior, and Acting Governor Sargent having in 1793 issued new commissions during pleasure, they declined to act under the new and threatened to proceed under the old. In this case, Sargent wrote, he would suffer proceedings to continue "except public Instances of their corruption should be adduced to me in which Case at all Events I should cry them down by proclamation."²⁵² Governor St. Clair was able to compose the judges and restore tranquillity. But in 1809 Governor Hull of Michigan called by proclamation upon all officials, civil and military, and all good citizens, to obey and enforce certain laws the validity of which was denied by two judges, though affirmed by him and a third judge.²⁵³ In only one of these cases, therefore, was there an actual proclama-

²⁴⁹ Letter of May 22, 1807—W. W. Cockrum, *Pioneer History of Indiana* (1907), 207.

²⁵⁰ See Carter, *Territorial Papers*, 2: 458, 520, 521-22, 523-24 (letter July 24, 1795), and W. H. Smith, *St. Clair Papers*, 2: 378-83 (letter of Dec. 3, 1795).

²⁵¹ *Ante* n. 216.

²⁵² To St. Clair, Feb. 7, 1793—Carter, *Territorial Papers*, 2: 432; compare 3: 408-10 and letter of St. Clair to Secretary Randolph, May 9, 1793—W. H. Smith, *St. Clair Papers*, 2: 312-15.

²⁵³ *Ante* at notecall 209; and Carter, *Territorial Papers*, 10: 295, 321-24.

tion, but the consequences in that case were of the utmost seriousness.

Instances of less seriousness were fairly numerous. Governor St. Clair, when in the Illinois Country in 1790 without the judges—so that no special session of the legislature was possible—"was pleased to order and direct" (as the executive journal reads) the creation of a new county; and by a "proclamation" created judicial districts within the same and provided for the holding of courts. He also regulated liquor licenses, and sales, in the same manner. He, in Illinois, and after his departure Acting Governor Sargent at Vincennes, similarly prohibited hunting in the Territory by strangers, regulated trade down the Illinois River through Peoria, required of all strangers passports and prompt report of their presence to local authorities, and forbade the cutting of timber for transportation to the Spanish side of the Mississippi.²⁵⁴ Some of these acts would seem to fall within the governor's military powers and his authority as superintendent of Indian affairs—which was everywhere interpreted as permitting him to control trade in and travel through the Indian country. Others very plainly were proper subjects of legislation. The President, when these acts were called to his attention, admonished St. Clair in "a private and friendly letter" to observe the utmost circumspection in avoiding acts which could enable persons to clamor against the government, "paying no regard to the absolute necessity of the case which produced a momentary stretch of power."²⁵⁵ Of course a clamor was raised, and the cry of government by proclamation was coined, for the frontier population was abnormally sensitive to any police regulations involving the sale of liquor (especially to Indians), hunting, spoliation, and illicit trade—as was again shown when Judge Turner interfered, five years later, with the last,²⁵⁶ and on other occasions.²⁵⁷ By another proclamation by Acting Governor Sargent, of this same period, he purportedly attempted to give effect to two territorial statutes three months before they could, by their terms, operate. "Of course,"

²⁵⁴ Carter, *Territorial Papers*. 3: 301, 308, 310, 314, 315. He also issued land patents in Indiana and Illinois—letter of Feb. 10, 1791 to Secretary of State—*ibid.* 2: 322; he was given this power by act of March 3, 1791—*ibid.* 2: 339.

²⁵⁵ Letter of Jan. 2, 1791 to St. Clair—Carter, *Territorial Papers*. 2: 320; compare 315, 318.

²⁵⁶ *Ante* xxxi and n. 68 (Sec. I).

²⁵⁷ *Ante* n. 87—tavern law of 1792; n. 94—Indian trade.

Judge Turner wrote to him, "any proclamation to the contrary is founded on no lawful authority, and . . . I should think it my indispensable duty to bring every magistrate to punishment who should presume to act under such a proclamation."²⁵⁸

There were similar instances in the Southwest Territory of proclamations essentially of legislative character, or altering legislative provisions, in 1793,²⁵⁹ but they were seemingly all cases of necessity and a committee of Congress by which some were considered reported that they should not be disapproved.²⁶⁰

It will be noticed that by far the most dangerous example of an improper resort to executive proclamation occurred in Michigan nearly twenty years after the last resort to such procedure in the Northwest and Southwest territories. It was quite true, as Sargent wrote to St. Clair in 1793, that where circumstances made legislation sporadic and scanty "An authority some where should exist for such temporary regulations as particular Exigencies might require—The Judges," however, he added, "never will, I am persuaded, consent to lodge this power with the Governour, and unless he may receive it from Sovereign Authority we shall I apprehend have Occasion long to lament a want of the necessary provision to our future welfare."²⁶¹ No difficulties had appeared in the very beginnings of the Territory, before even the simplest civil organization had been effected. When it was desired, for example, to prohibit the sale of liquor to Indians at Marietta in 1788, a "temporary regulation" was adopted, forbidding such sales unless licensed by the commanding general or the chief of police.²⁶² This was long before there were any laws establishing courts or regulating the subject matter. The Governor and judges were there—all old soldiers; but the "regulation" need not be considered military. For months the Marietta community lived like any frontier settlement, under its own extemporized rules of conduct. Such simple and uncritical co-operation between the civil and military, the executive and judicial, powers—and submission by all to regulations *all* devised as members of the community—could not survive the creation of a formal gov-

²⁵⁸ Carter, *Territorial Papers*. 2: 305, and the laws cited in n. 25.

²⁵⁹ *Ibid.* 4: 309, 452, 453, 454.

²⁶⁰ *Ibid.* 327-28.

²⁶¹ *Ibid.* 3: 400.

²⁶² *Ibid.* 2: 137; also *ante* ccclxix and n. 278.

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ernment. Organization necessarily involved a division of powers, and that has for its very purpose the development of jealousies of jurisdiction. Thus, within a government near to despotism there necessarily developed jealousies of office that sharpened distinctions of function, and would result in a completer division of powers.

(3) PARDONING POWER.

Prayers for the exercise of this power were certain to arise—particularly if crimes on the frontier should be as numerous and vicious as conservatives like the Ordinance's framers imagined them. Yet there was no mention of the power in the Ordinance. In fact it was first mentioned in the organic act of Orleans Territory of 1804.²⁶³ Since the portion of that enactment relating to the District of Louisiana extended over this the executive authority of the governor of Indiana Territory,²⁶⁴ the exercise of the power rested in the District, temporarily, upon implication only—for when Indiana had been separated “for the purposes of temporary government” from the Northwest Territory, the Ordinance as the latter's organic act was merely continued as such in the daughter territory.²⁶⁵ And this was true, likewise, in the case of Michigan Territory, when created by severance from Indiana.²⁶⁶ But, two months later, when the government of the District of Louisiana was revised, the draftsman of its new organic act—discovering in its first the express grant of the pardoning power in the Orleans portion—inserted this in the new act for the Territory of Louisiana (Missouri).

This matter of clemency to criminals—seemingly not often shown in those times—is not of itself of particular importance. As regards actual territorial administration it happens that the variances of legislation pointed out were of *no* importance, because the power, where not expressly given, was everywhere assumed to be impliedly granted. But the illustration of variant statutory provisions through different lines of territorial “descent” is significant because very characteristic of all legislation on the territories down, *at least*, to the passage of the Wisconsin act in 1836; and in my opinion Dr. Farrand

²⁶³ Sec. 2 of act of March 26, 1804—*ibid.* 9: 204.

²⁶⁴ Sec. 12, *ibid.* 210.

²⁶⁵ Secs. 1-3 of act of May 7, 1800—*ibid.* 3: 86-87.

²⁶⁶ Secs. 1-3 of act of Jan. 11, 1805—*ibid.* 10: 5-6.

exaggerated the uniformity even of general principles that followed that.²⁶⁷ Down at least to that date there was no *centralized* attention, no *constant* attention, to territorial conditions or problems by any department of government. There was necessarily some uniformity in skeletal provisions, but only because so general, so elementary, that they were in all cases necessarily stated.

As for the actual practice respecting pardons, Governor St. Clair, and Secretary Sargent after his transfer to Mississippi²⁶⁸ as governor, considered the power implied. Governor Blount did the same in the Southwest Territory.²⁶⁹ As already stated, the power was explicitly conferred in the Louisiana-Missouri Territory, but was rarely exercised.²⁷⁰ No question of a pardon seems to have arisen in Michigan until 1809 when the governor was asked to remit a fine. Hesitating to do so because he had no express authority, the attorney general of the Territory informed him that St. Clair had always considered the power incidental to the governor's office; that he had heard the judges of the Northwest Territory "give an Opinion, that it was incidental," and that Governor Harrison had remitted penalties in Detroit, when it was part of Indiana. Governor Hull, on these precedents, exercised the power.²⁷¹ It was seemingly liberally exercised by Harrison.²⁷²

(4) APPOINTING POWER.

It was provided in the Ordinance that there should be "appointed from time to time by Congress" a governor and a secretary. After some other provisions respecting each of these officers the Ordinance continued: "There shall also be appointed a court . . . of three judges"—but by whom was not stated. The third paragraph following this read as follows:

²⁶⁷ M. Farrand, *Legislation for the Territories*, 15, 38.

²⁶⁸ Carter, *Territorial Papers*, 6: 69-70, 72, 134-35, 288, 334-35.

²⁶⁹ *Ibid.* 4: 466.

²⁷⁰ *Ibid.* 13: 542-43; T. M. Marshall, ed., *The Life and Papers of Frederick Bates* (1926).

²⁷¹ Carter, *Territorial Papers*, 10: 302-3. This power also was given to different territorial governors irregularly. The general principle was not adopted that it belonged in each organic act. The governor of Missouri Territory, for example, did receive it in 1805 and in 1812—*U. S. Stat. at Large*, 2: 331, 744; but it was expressly granted in Michigan only in 1823—act of March 3, *ibid.* 3: 770 (sec. 5).

²⁷² Philbrick, *Laws of Indiana Territory* (I.H.C. 21), clxxiv, clxxvi, clxxviii.

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Previous to the Organization of the General Assembly the governor shall appoint such magistrates and other civil officers in each county or township, as he shall find necessary for the preservation of the peace and good order in the same. After the general assembly shall be organized, the powers and duties of magistrates shall be regulated and defined by the said Assembly; *but all magistrates and other civil officers, not herein otherwise directed shall during the continuance of this temporary government be appointed by the governor.*²⁷³

When the Ordinance was re-enacted the foregoing provisions were altered by this amendment: "the President shall nominate, and by, and with the advice and consent of the Senate, shall appoint all Officers which by the said Ordinance were to have been appointed by the United States in Congress assembled." It has already been pointed out that the inclusion of the judges among officials appointed by the federal government rested upon common sense rather than upon a strictly legal construction of the Ordinance.²⁷⁴ To have allowed their appointment by the governor would have been a monstrous disregard of the doctrine of checks and balances, inconceivable by officers of a federal government of which that doctrine was the basis.

Aside from this one extraordinary ambiguity there could be little doubt concerning the governor's unlimited powers, as expressed in the Ordinance. They were challenged in various territories, bitterly; but with one exception—the power to appoint clerks of the General Court—the chief cause for contesting his powers was political. That is not to be wondered at, for the exercise of the powers by the governors was equally political. From the highest judicial, fiscal, and other administrative officers of the county to the lowest

²⁷³ Carter, *Territorial Papers*, 2: 41, 43-44; italics added.

²⁷⁴ The Ordinance also provided that militia officers of general rank and members of the legislative council should be appointed by Congress, and there was this provision: "The Governor, Judges, legislative Council, Secretary, and such other Officers as Congress shall appoint . . . shall take an Oath or Affirmation of fidelity"—*ibid.* 43, 44-45. Laymen would conclude from this that although it was not *expressly* provided that the judges should be appointed otherwise than by the governor, the inclusion of the word "judges" in the provision for an oath of office carried an implication that should bar appointment by the governor. Under general rules of legal construction this would not be so—as Attorney General Levi Lincoln pointed out ("express positive provisions are not usually abridged by implications"—*ibid.* 3: 209). See *ante* n. 9, *post* n. 276.

of township officials all the local officers were under the governor's control—nearly seven hundred in Ohio, St. Clair's opponents estimated, on the eve of its admission to statehood.²⁷⁵

There was no question whatever of an unfettered power to appoint all militia officers under general rank,²⁷⁶ but—presumably because of the social prestige involved²⁷⁷—no other appointments were so productive of animosities. Governor Ninian Edwards of Illinois evaded his responsibility by substituting company elections for appointments by himself on his own judgment and responsibility.²⁷⁸

²⁷⁵ *Ibid.* 3: 224. Of course, when the opposition had as its friend a secretary of its party, or one ambitious of succeeding as governor, it resorted to politics, so far as possible, through him—*ante* cccxcviii-ix; Carter, *ibid.* 3: 240, 242. When the Mississippi legislature petitioned in 1802 for a change in the appointive system its desires, naturally enough, were to strip the governor of all powers and exercise them itself—*ibid.* 5: 160.

²⁷⁶ *Ibid.* 2: 43. Judge Woodward denied the right of Governor Hull of Michigan to issue brevet commissions—*ibid.* 10: 251-52. The original Ordinance gave the governor power to appoint militia officers below general rank. The re-enacted Ordinance gave to the president and Senate the power to appoint officials who by the original Ordinance were appointable by the old Congress. Militia officers of general rank were not mentioned as appointable by the old Congress. The question necessarily arose, who should appoint them; Carter, *Territorial Papers*, 6: 15, 52, 223-24, 526. In 1810 Attorney General Rodney was of the opinion that the statutes "clearly established" the right of appointment by president and Senate—*Official Opinions of the Attorneys General of the United States* (1852 ———) 1: 165. Clearly this was mere assumption. However, as respects precedent, he stated that there had been presidential appointment in more than one instance—and seemingly referred to Mississippi Territory alone.

²⁷⁷ Much later, Governor Coles reported to the Secretary of War that the militia in Illinois was inefficient and of bad social effect; that it was "a mere school of titles"—E. B. Greene and C. W. Alvord, *The Governors' Letter Books, 1818-1834* (I.H.C. 4), 110. But its nature was the same everywhere. On the status of the officers of the regular army in Mississippi Territory see *ante* n. 18; it is probably no mere coincidence that troubles over militia appointments were there particularly serious—see Carter, *Territorial Papers*, 5: index s.v. "Militia—appts. to."

²⁷⁸ N. W. Edwards, *History of Illinois*, 34-35; against the advice of Senator John Pope of Kentucky, a lifelong friend—E. B. Washburne, ed., *The Edwards Papers* (Chicago Historical Society's Collection, vol. 3, 1884), 40. Characteristically, Gallatin approved of Edwards' action—*ibid.* 46-47. It was probably general doctrine among pronounced Republicans—see Nathaniel Macon's opinion, W. H. Smith, *St. Clair Papers*, 2: 591; see also petition from Clark County, Indiana Territory, Dec. 12, 1809—Carter, *Territorial Papers*, 7: 687. Governor Edwards also, in 1815, remitted all militia fines imposed that year—E. J. James, *Territorial Records of Illinois* (Ill. State Hist. Library Publications, no. 3), 38; and see law of Jan. 4, 1816—*post* 195.

Naturally the Governor's concession to the militia provoked a demand for popular election of county officials—E. B. Washburne, *Edwards Papers*, 72. To that, however, he did not yield.

Contention over appointments to the minor judiciary were few,²⁷⁹ and such as arose were not due to obscurity in the Ordinance. The difficult point of the governor's power to remove an officer he had appointed was raised in Michigan, but as the commissions involved had all been for tenure at the governor's pleasure the issue lacked substance.²⁸⁰ It appears, however, that in the Northwest Territory commissions to county judges that were in terms for tenure without limitation of time, and issued before the passage of laws regulating the courts inconsistently with such tenure, were recalled and commissions for tenure at the governor's pleasure substituted. The judges refused to accept the new commissions, and threatened to continue holding court under the old. "I was prepared," Governor St. Clair wrote to the Attorney General, "if they persisted in holding the court under their first commission . . . to have sent them a *supersedeas*, which would have stopped them, but not without some confusion and discontent." The difficulties were nevertheless composed only by a compromise which permitted one session under a commission of the original form, the proceedings to be given "validity" by the legislature.²⁸¹ It is not intended to suggest that the Ordinance should have contained provisions anticipatory of such contingencies. The problem of removals, still a difficult one, was no doubt then scarcely adumbrated. The purpose is merely to continue illustrations of the Ordinance's mundane imperfections.

As already said the point most strongly contested was control of an auxiliary officer of justice—the clerk of court. St. Clair would not receive from courts, "as Courts," recommendations of men for appointment as justices of the peace, though he would gladly receive from the judges as individuals information respecting the qualifications of possible appointees.²⁸² Governor Harrison, on the other hand, gave public notice that he would welcome suggestions as to

²⁷⁹ Judge Woodward questioned the power of Governor Hull to appoint justices of the peace with jurisdiction throughout the Territory of Michigan—Carter, *Territorial Papers*, 10: 254. The power, however, seems to have been clear. Governor St. Clair appointed Secretary Sargent and Secretary Harrison such justices in the Northwest Territory—*ibid.* 283, 517.

²⁸⁰ *Ibid.* 10: 254-55.

²⁸¹ Sargent to the judges, Feb. 9, 1793—*ibid.* 3: 408-11; St. Clair to Attorney General Randolph, May 9, 1793—W. H. Smith, *St. Clair Papers*, 2: 312-15; commission of Aug. 6, 1793—Carter, *Territorial Papers*, 2: 456; St. Clair to Secretary Jefferson, Aug. 9, 1793—*ibid.* 457.

²⁸² *Ibid.* 3: 435.

any office and acted on recommendations of judges for appointments to their own court. Yet even he vetoed a bill because it provided that the governor should remove any clerk of court upon request of the court. "I cannot consent," said he, "that a single judge, or any number of judges, shall have the right to direct the executive in any matter which is purely of an executive nature." So much for interference by the *judiciary*. Another reason was that the bill provided that clerks of the common pleas should also be clerks of the district courts in counties where the emoluments of one office alone would not induce a properly qualified person to serve. The governor, Harrison said, must be free to divide the offices if he thought it proper to do so. So much for interference by the *legislature*.²⁸³

These instances illustrate how strongly the executive department had come to cherish its statutory power. In the Southwest Territory the judiciary seemingly acquiesced in the executive claim as warranted by the Ordinance.²⁸⁴ On the other hand, in the Territory of Orleans the governor seems to have acquiesced for several years, at least in the case of the highest territorial court, in a choice of the clerk by the judges. But, later, Governor Claiborne asserted his superior right, and had his way.²⁸⁵ In Mississippi Territory the original practice was as in the Northwest Territory, but a decade later—in the case of the highest court—its judges were asserting the common law principle that the power to appoint its clerk was a prerogative inherent in the court, which refused to recognize the governor's appointee. The question was referred by the Secretary of State to the Attorney General. It does not appear what opinion he gave, but a distinction could hardly be drawn between the county and the territorial courts, and the governors continued to appoint the latter.²⁸⁶ In general, appointments by the governors unquestionably prevailed. But it has already been seen how determined was the opposition of the territorial judges in the Illinois Territory in 1814 to the provision for appointment by the governor

²⁸³ On his general policy see Philbrick, *Laws of Indiana Territory* (I.H.C. 21), xix. On the veto see L. Esarey, *Messages and Letters of W. H. Harrison*, 1: 319.

²⁸⁴ Carter, *Territorial Papers*, 4: 123.

²⁸⁵ *Ibid.* 9: 852.

²⁸⁶ *Ibid.* 5: 655-56, 731; 6: 247-48, 282.

of clerks of the General Court, and that Congress, in the act of 1815 which settled the controversy, gave to the territorial judges the power of appointing the clerks both of the Supreme Court of Appeal and of the several circuit courts held by the judges individually. It has also been seen that this reorganization of the Illinois territorial judiciary became the model for the judicial system in other territories thereafter.²⁸⁷ It must be regarded as an amendment of the Ordinance, not extending to the subordinate courts in territories under that instrument's governmental plan.²⁸⁸

It might have been expected that appointments by the governor to *new* offices—not mentioned in the Ordinance—would have roused the strongest opposition. This opportunity was, however, generally overlooked. Such an office was that of the territorial attorney general, and its origins are in other ways so interesting as to excuse a brief account of them. Governor St. Clair suggested the necessity of such a legal officer in territorial administration after one year of his own experience.²⁸⁹ It was eight years, however, before the office was effectively filled, notwithstanding that its existence was earlier assumed and a salary provided for it in earlier legislation.²⁹⁰ The delay was due to three causes: the impossibility of securing a competent lawyer (one capable, among other qualifications, of giving St. Clair assurance in dealing with the judges—though all were his inferiors), reluctance to burden the Territory's scanty population with a salary adequate to attract talent, and a hope that the federal government would assume the burden.²⁹¹ There was good excuse for this hope, and for a time the propriety of aid was recognized in

²⁸⁷ *Ante* liv.

²⁸⁸ For example in Michigan—compare *ibid.* 10: 732, 771, 773 for appointments by the governor in 1817-1818 of clerks of county courts.

²⁸⁹ In a letter of Aug. 1789 to the President—*ibid.* 2: 207-8.

²⁹⁰ In 1796—see *ibid.* 2: 208 n. 39 for various citations respecting the Northwest Territory.

²⁹¹ St. Clair wrote to Secretary Wolcott, Dec. 3, 1795: "The Office has been refused, or"—*nota bene*—"resigned, by every Practitioner at the Bar who was in any wise Capable of executing it. The necessity of such an Officer, and that some allowance should be made him by the United States, has been often, and fruitlessly, reported by me, & as yet the Situation of the People does not admit of their being burdened with Salaries." The emoluments of the office had been increased by an act of June 16, 1795 [T. C. Pease, *Laws of the Northwest Territory* (I.H.C. 17), 170-81]. He had offered the position to his son, practicing in Pittsburgh—Ohio State Lib.: St. Clair Papers: Copy (transcript read in State Dept.).

Washington.²⁹² However, after a federal district court was established in 1804 in the Territory of Orleans,²⁹³ and provision had been made the following year for the office of district attorney in other territories, as well, for protection in territorial courts of the interests of the United States when it was a party to suits in equity therein,²⁹⁴ this very limited aid was adhered to by the federal government as sufficient. Now, all territorial interests, including those protected in prosecution for crime, were interests—in either a materialistic or a nonmaterialistic sense—of the United States, to which the territories belonged. All parties disregarded the nonmaterial interests. But even as respects material, the territorial attorneys general, in defending territorial interests in common law litigation must actually and incidentally have defended national interests to some extent. Despite the federal government's limitation upon its financial aid it continued to receive in some territories the services of their legal officer.²⁹⁵ Of course there naturally existed some confusion in early years between the two offices;²⁹⁶ and since that could not have existed in Governor Harrison's mind, it is clear that in 1808 the attorney general of Indiana was performing services for the United States of which the legislature was not conscious.²⁹⁷ The attorney general,

²⁹² Secretary Sargent, on becoming governor of Mississippi Territory, evidently urged the necessities of the office upon Secretary Pickering who replied: "a Territorial Attorney . . . could a provision be obtained for such an officer, might render services to the United States as well as to the Territory, to merit a handsome compensation"—Dec. 10, 1798, Carter, *Territorial Papers*, 5: 53. In the petition of the Vincennes Convention (Dec. 1802) there was included a prayer that the attorney general of the Territory be compensated for services rendered the United States—J. P. Dunn, "Slavery Petitions and Papers," Ind. Hist. Soc. *Publications*, 2: 467; and committees of the House of Representatives twice reported favorably on the demand—March 2, 1803 and Feb. 17, 1804, in *Annals*, 7 Cong. 1 Sess. 1353, 8 Cong. 1 Sess. 1023; the latter also in *ASP. Misc.* 1: 387.

²⁹³ Secs. 8, 6 of act of March 26, 1804—Carter, *Territorial Papers*, 9: 208, 205.

²⁹⁴ *Ante* xl-xli.

²⁹⁵ So in Michigan Territory, where the office of attorney general was created by a territorial law of 1807. "Previous to that date, and under [an earlier] territorial law . . . the court appointed an attorney from time to time as occasion arose to represent the Territory and the United States"—*ibid.* 10: 207 n. 11. There speedily existed in that Territory imperative reasons for a district attorney because of the great number of admiralty and customs cases. In Illinois the establishment of a federal court followed by some time the creation in 1818 of the state.

²⁹⁶ *Ante* n. 114 of Sec. I.

²⁹⁷ Since Governor Harrison vetoed a bill concerning the office of attorney general, which bill provided for his appointment by the general as-

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before there were regularly provided county or district attorneys, sometimes served the counties.²⁹⁸

On the governor's mere *power* of appointment to the office little controversy arose. The circumstances under which Governor St. Clair made the first appointment were such that, as respected merely the appointment, no charge of politics or nepotism could very well be made,²⁹⁹ but the fact that the commission to his son was made, most exceptionally, for tenure during good behavior—in order to protect him, as the Governor frankly admitted, against removal by an expected successor—was one of the few charges, among those pressed against him in 1802, which the members of the President's cabinet found established and strongly condemned.³⁰⁰ In the District of Louisiana (Missouri) much more serious difficulties devel-

sembly (or house of representatives), for two reasons: first, that it violated the Ordinance of 1787; second, that it was improper because the attorney general prosecuted pleas of the United States—L. Esarey, *Messages and Letters of W. H. Harrison*, 1: 320. The reference was doubtless to actions at law.

²⁹⁸ For example, Benjamin H. Doyle was allowed \$10 on March 7, 1810 by Randolph County, Illinois, for his services as attorney general in prosecuting Francis King and James McGlaughlin "before the last Genl Court at Kaskaskia"—County Court Record, 1810 (MS), p. 18. And on July 5, 1810 "The Court taking into Consideration the many embarrassments they often experience in the settlement of Claims against the County and that in all probability many impositions may be practiced upon them, do agree to allow Thomas Y. Crittendon attorney Genl the sum of ten dollars per term for every term he shall attend for the purpose of giving counsel to the court in behalf of the County"—*ibid.* 47.

²⁹⁹ *Ante* n. 291.

³⁰⁰ For the charges see Carter, *Territorial Papers*, 3: 212-13. Attorney General Lincoln pronounced it "highly censurable"; the Secretary of the Navy, Robert Smith, found St. Clair's justification unsatisfactory; Secretary Madison found the action admitted and unpalliated, and Gallatin merely emphasized that it was admitted but did not regard it (together with other charges) sufficient to justify removal.

Most of the significant documents recording the efforts to secure St. Clair's removal from office will be found *ibid.* 198-258. Attorney General Lincoln's letter of May 25, 1802 to the President might be added—Library of Congress: Jefferson Papers. References to other materials in W. H. Smith, *St. Clair Papers*, and in D. M. Massie, *Nathaniel Massie* (1896) are given by Dr. Carter, *ibid.* 220 n. Those who read St. Clair's letter on the notice of his removal—W. H. Smith, *ibid.* 2: 599-601—should also read Madison's earlier admonition of June 23 (referred to by Smith, *ibid.* 570 n.) in Carter, 3: 231, and St. Clair's reply to this admonition quoted by Smith, 2: 571 n. In order to understand the comments of cabinet members upon no. 7 of the specific charges listed in Carter, *op. cit.* 3: 212-13, it is necessary to note St. Clair's letter to the justices of Adams County—Smith, *op. cit.* 425 n. The opinions of Secretaries Gallatin, Smith, and Madison (that of Levi Lincoln is cited above) will be found in the Lib. of Cong.: Jefferson Papers, vol. 123, under dates of April 30, June 15, and June 19 respectively.

oped. While Governor Harrison of Indiana acted as its executive he appointed an attorney general of the territory, Rufus Easton, but the office was vacated by his appointment as a territorial judge.³⁰¹ Probably following a practice in the Territory of Orleans³⁰² Governor Wilkinson nominated James Donaldson as "a District Attorney to attend the [General Court] . . . since the Territory is divided into Districts." The two territorial judges refused to acknowledge the commission, seemingly with some justification. In various territories an attorney general was appointed preceding statutory creation of the office; it was seemingly regarded as being at common law an office necessary to the administration of justice. Hence, in 1789, St. Clair declared: "the Governor by the Ordinance has power to appoint an Attorney General but not to give him a Salary."³⁰³ However, the situation in Louisiana Territory was not one of common law. The statute of Congress was miserably drafted, and if it covered the situation at all it was by implication, and despite inconsistencies.³⁰⁴

Governor Wilkinson next gave Mr. Donaldson a commission as

³⁰¹ Carter, *Territorial Papers*, 13: 253.

³⁰² The attorneys listed *ibid.* 9: 602—other than J. W. Gurley, who was attorney general of the Territory (*ibid.* 798)—appear to have been district attorneys. I find nothing through the index (*s.v.* "attorney," "district," "territorial," "United States") to explain them. Districts were important administratively in both Orleans and Louisiana-Missouri.

³⁰³ *Ibid.* 2: 208. The Ordinance empowered him to appoint before the organization of representative government "such . . . civil officers in each county or township, as he shall find necessary for the preservation of the peace and good order in the same (*ibid.* 43, italics added); and even after organization of representative government to appoint "all . . . civil officers, not herein otherwise directed" (*ibid.*).

³⁰⁴ The Governor relied upon secs. 1, 5, 9 of the act of March 3, 1805—*ibid.* 13: 92. Its grant of power in sec. 1 to "appoint and commission all officers" was seemingly limited to the militia. The power (sec. 5) to divide the Territory into districts, and appoint thereto "such . . . civil officers, as he may deem necessary" was seemingly limited to new areas as Indian titles should be extinguished, and moreover the quoted words continued: "whose several powers and authorities shall be regulated and defined by law." There was no law. However, an analogous office of a district had existed under Spanish administration, and the act of Congress declared (sec. 9) that "the laws and regulations in force in the said district"—meaning here District of Louisiana—when the act became effective should remain in force until altered. The Court's decision rested upon these grounds: (1) since the Court's jurisdiction embraced the entire Territory, the attorney's must likewise; (2) there was no law regulating and defining the office of a district attorney; (3) by act of Governor Harrison an office of attorney general of the entire Territory existed, and no later act had altered it. See Carter, *Territorial Papers*, 13: 259.

attorney general. This was also rejected by the Court, on the ground that the situation had changed. The governor's appointing power was now restricted, the judges said, to districts of the Territory, because such power was referred to in the new statute. But this view seems to be erroneous. Under the act of 1804 the judges of Indiana Territory were to "exercise" in Louisiana the common law jurisdiction which they exercised at home; the territorial court established in Louisiana in 1805 was to "*possess* the same jurisdiction which [was] possessed by the judges of the Indiana Territory." And though it was also provided, as in 1804, that laws and regulations in force in Louisiana when each act took effect, so far as consistent with them, should remain in force until modified by territorial legislation,³⁰⁵ manifestly the introduction of common law was permanent. The situation was therefore that which was stated by Governor St. Clair in 1789, unless modified by the act of 1805 itself. The final argument of the judges, that in that *act* there was no provision for the office of attorney general, was therefore without force.³⁰⁶ Considerations other than legal very likely entered into the decision.³⁰⁷

(5) POWER TO CREATE COUNTIES AND COUNTY SEATS.

The Ordinance provided that "for the execution of process . . . the governor [should] make proper divisions [of the territory], and he [should] proceed from time to time . . . to lay out . . . counties and townships subject however to such alterations as may thereafter be made by the legislature."³⁰⁸ In a territory that increased in popu-

³⁰⁵ See *ibid.* 260; also sec. 12 of act of March 26, 1804 and sec. 4 of act of March 3, 1805—*ibid.* 9: 210 and 13: 93 respectively, on nature of the Court's jurisdiction; sec. 13 of 1804 (*ibid.* 9: 211) and 9 of 1805 (*ibid.* 13: 94).

³⁰⁶ After rendering the first decision the Court invited Donaldson "to undertake the Business by appointment of the Court," and when he declined appointed W. C. Carr (Philbrick, *Laws of Indiana Territory, I.H.C.* 21, cclxxv; but see Carter, *Territorial Papers*, 13: 162 n. 17) as prosecuting attorney.

³⁰⁷ See *ibid.* index s.v. "Territorial Governor—conflict with judges," "Lucas, J. B. C." and "Easton, Rufus." Some correspondent of Attorney General Breckinridge attributed to the judges a theory that powers undelegated expressly to territorial authorities remained in Congress or the territorial legislature; then that the *latter* held undelegated appointive powers—*ibid.* 324-25. The theory was absurd, but the *desire* to have such powers in the legislature (all such powers) was probably common among extreme Republicans; compare Nathaniel Macon's views—W. H. Smith, *St. Clair Papers*, 2: 590-91.

³⁰⁸ Carter, *Territorial Papers*, 2: 44.

lation so rapidly as the Northwest Territory, the power to create counties and fix their seats of administration was one, potentially, of great political power. The fact that three of the first judges and legislators of the Territory (and very especially Judge Symmes) were prominent in the great land developments of the Territory had made the exercise of the power, from the beginning, a matter of dangerous potentialities as respected the development of territorial factions. Add the strong and outspoken Federalist opinions of Governor St. Clair and the political fever which ran so high at the opening of Jefferson's administration, and it was inevitable that this power of the governor was the one over which the most serious conflict was certain to arise.

There was only one question seriously at issue. In every territory, under plain empowerment by the Ordinance, the governor created counties and fixed their administrative seats during government of the first stage. The questions were two: the first, whether the Ordinance should be interpreted as meaning that after the establishment of representative government the governor's powers wholly ceased; and the second—assuming a negative answer to the first question—whether the powers were traditionally so plainly legislative that further exercise of them by the governor would constitute seriously censurable conduct.

The differences between Governor St. Clair and his opponents came to a head in 1799—no doubt by their planning—when he vetoed eleven bills passed by the first elected legislature of the Territory, of which six created new counties.³⁰⁹ Thereafter—in 1800 and 1801—he created by proclamation four counties.³¹⁰ All of these except the first the legislature seemingly ignored, making no provision for them.³¹¹ The President submitted to the Attorney General the question "Whether his exercise of these powers be lawful under the acts establishing the Northwestern territory."³¹² After "the utmost at-

³⁰⁹ See his address to the legislature, Dec. 19, in which the reasons are given—W. H. Smith, *St. Clair Papers*, 2: 477-79. "It is, indeed, provided," said he, "that the boundaries of counties may be altered by the legislature; but. . . . They must exist before they can be altered, and the provision is express that the Governor shall . . . lay them out" (477).

³¹⁰ Carter, *Territorial Papers*, 3: 525, 526, 528.

³¹¹ Worthington so stated in Aug. 1801 of the second and third, shortly before creation of the fourth—*ibid.* 171.

³¹² *Ibid.* 207.

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teution” that he could give to the inquiry he reported that he could find “no grounds, or principles for a very confident decision in, or out of the ordinance.” Nevertheless, he said, the power “being once confessedly in him, & by general terms implying no limitation in point of time, the authority must be considered as still remaining in him unless it is taken away, expressly, or by some strong implication, or by some unforeseen change of the subject matter upon which, or of the circumstances under which the power is exercised.” There was no express limitation; yet in each of the three preceding paragraphs a power was given subject to an express limitation. He found no implied limitation. And the stated *reason* for which the power was given—“for the execution of processes civil and criminal” to make “proper divisions, and from time to time as circumstances should require”—was equally applicable to the first and second stages of government. In short, after sleeping many nights on his first impressions—in deference to the opinions of many who denied St. Clair’s authority—he remained of the opinion that the power was in the governor.³¹³

The first charge against St. Clair laid before the President the same month was that “he [had] usurped legislative powers by the erection of courts and location of seats of justice by proclamations on his own sole authority.”³¹⁴ The definition of boundaries had never been regarded as being, alone, creation of a county. The naming of its judicial and other administrative personnel had always accompanied the description of area. In the form just quoted the issue was submitted to the President’s cabinet. Not one found the charge “established.” The Attorney General held that even a strict construction of the Ordinance allowed the governor a power to create a county and appoint its officers; but that a liberal construction was required in order to include the power of fixing the county seat.³¹⁵

When St. Clair was removed, later in 1802, it was for purely political reasons.

³¹³ *Ibid.* 208-11—opinion of Feb. 1802.

³¹⁴ *Ibid.* 212.

³¹⁵ See the citations *ante* n. 300. In Madison’s letter communicating to Governor St. Clair the President’s disapprobation of certain of his acts (“in granting to your son an illegal tenure of office, and in accepting yourself illegal fees”) nothing was said of the charge here in question except that the Governor had “not pursued the construction put by the Executive on the Ordinance”—*ibid.* 231.

William Henry Harrison's political sagacity led him to announce, in his address to the first legislature of Indiana Territory, that he construed the Ordinance as leaving the erection of new counties to the legislature.³¹⁶ In Illinois a similar policy prevailed. Two days after creating by proclamation three new counties in 1812,³¹⁷ Governor Edwards ordered elections for the first general assembly, and thereafter all counties were created by it, although the governor was either allowed or specially authorized to commission their civil and military officers.³¹⁸

This concludes an examination of territorial administration in early years, particularly as affected by imperfections of the Ordinance. The facts have been known to many writers who have nevertheless ignored them. Few statutes are perfect; those of the Ordinance's time were certainly far inferior in clarity to laws of the present day. But those facts do not at all alter the fact that the Ordinance was miserably drafted. As an instrument to serve as the basis of territorial administration there was no greatness in it—and in earlier sections it has already been seen that there was little *original* greatness in it otherwise.

The preceding introduction, except in its first section, has dealt with the Ordinance of 1787 and with territorial administration under it during the first, or nonrepresentative, stage of government—to which the early settlers of Indiana were subjected as citizens of two, and those of Illinois as citizens of three, territories successively. References have been made to later laws, incidents, and illustrations only for the purpose of clarifying the meaning or emphasizing the character of the Ordinance's provisions. No attention has been given to the slow liberalization of territorial government. Slight relaxations of its illiberalities were made even under government of the first stage, and that monstrous anachronism itself altogether disappeared, within the first half-century after 1787. But reform had then barely begun; most of the Ordinance's other great illiberalities were

³¹⁶ Compare Philbrick, *Laws of Indiana Territory* (I.H.C. 21), xix.

³¹⁷ On Sept. 14, 1812 Governor Edwards proclaimed the creation of three new counties—E. J. James, *Territorial Records of Illinois* (Ill. State Hist. Library Publications, no. 3), 26.

³¹⁸ Compare *ibid.* for appointments, and for creation of counties see *post*, index *s.v.* "counties."

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carried over into the organic acts by which different territories—from the organization of Wisconsin Territory in 1836 onward—were successively created.³¹⁹ The story of this continuing political illiberalism would, of course, be impertinent to the purposes of this introduction. A reference to even the earliest reforms would be pointless unless contrasted with the many much more radical changes demanded in petitions of the time; and to recount the latter would be of little value except as part of an account showing how greatly realization of the reforms demanded lagged behind progress in the states.

³¹⁹ In this sense that Dr. Farrand could unfortunately write correctly in 1921: "The principles of territorial government today are identical with those of 1787"—M. Farrand, *The Fathers of the Constitution* (1921), 77. "Certain modifications came with time. The veto power of the governor was limited, the people received the right to elect their councilmen and their delegates [delegate] to Congress by direct vote; and the legislature was authorized to hold regular sessions, with which the governor might not interfere. But all the important executive and judicial officers continued to be appointed from without; the authority which gave validity to measures of the territorial government was derived solely from an act of Congress; and the national legislature, if it chose, might interfere in local affairs even to the extent of disallowing territorial laws"—J. D. Hicks, *The Constitutions of the Northwest States* (1923, University of Nebraska Studies, vol. 23), 6.

THE LAWS OF
ILLINOIS TERRITORY
1809-1818

Laws of the Territory of Illinois 1809-1811

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LAWS OF THE TERRITORY OF ILLINOIS,

1809-1811*

ILLINOIS TERRITORY,¹

13th June, 1809.

This day Ninian Edwards, Governor of the Illinois Territory, Alexander Stuart and Jesse B. Thomas, Judges in and over the Territory aforesaid, met at the home occupied by Mr. Thomas Cox in the town of Kaskaskia, and after mature deliberation, they hereby resolved as their opinion that the laws of Indiana Territory of a general nature and not local to that Territory are still in force in this Territory as they were previous to the first day of March last.

NINIAN EDWARDS,
ALEXR. STUART,
JESSE B. THOMAS.

AN ACT repealing certain laws and parts of laws.

Be it enacted by the Governor and Judges of the Illinois Territory, and it is hereby enacted by the authority of the same: That the laws and parts of laws hereinafter particularly enumerated and expressed be the same and are hereby repealed, to-wit:

The act to organize a court of chancery passed by the General Assembly of the Indiana Territory on the seventeenth day of September, eighteen hundred and seven.

So much of the third section of the act for the appointment of justices of the peace within the several counties of the Territory and prescribing their duties and powers therein, passed by the General Assembly of the Indiana Territory on the seventeenth day of September, eighteen hundred and seven, as makes it the duty of the justices of the peace to punish assaults and batteries.

So much of the sixth section of the act regulating the admission and practice of attorneys and counsellors at law passed by the Gen-

* In this edition of the laws the clerk's copy for Randolph County has been followed and all variant readings of the copy printed in the *Louisiana Gazette*, St. Louis, have been noticed in the footnotes or inserted in brackets in the text. The punctuation and capitalization of the printed copy are more in accordance with modern standards. The language and orthography are unaltered. The order of the laws followed is strictly chronological, and does not agree with that of the printed copy and of the "Executive Register." (See Introduction to Bulletin of the Illinois State Historical Library, Vol. I, No. 2.)

¹ *Louisiana Gazette*, Feb. 15, 1810. "The following LAWS have been adopted by the Governor and Judges of the Illinois Territory."

eral Assembly of the Indiana Territory on the seventeenth day of September, eighteen hundred and seven, as prohibits the admission of attorneys and counsellors at law to practice in the courts in this Territory who are not residents thereof.

The third and fourth sections of the act in addition to an act entitled, "An act regulating the practice in the general court, courts of common pleas and for other purposes," passed by the General Assembly of the Indiana Territory on the twenty fifth day of October, eighteen hundred and seven.¹

[And the sixth section of the act organizing courts of common pleas, passed by the General Assembly of the Indiana Territory on the seventeenth day of September, eighteen hundred and seven].

The foregoing is hereby declared to be a law of the Territory and to take effect and be in force from the date thereof.

In testimony whereof, we, Ninian Edwards, Governor, and Alexander Stuart, and Jesse B. Thomas, Judges, have hereunto signed our names at Kaskaskia, the sixteenth day of June, in the year of our Lord one thousand eight hundred and nine, and of the Independence of the United States the thirty-third.

NINIAN EDWARDS,
ALEX. STUART,
JESSE B. THOMAS.

AN ACT concerning the courts of common pleas and county courts.

Be it enacted by the Governor and Judges of the Illinois Territory, and it is hereby enacted by the authority of the same: That all the jurisdiction over suits and process of a civil and criminal nature heretofore vested and exercised by the court of common pleas shall hereafter be vested in, [and] exercised and discharged by a judge of the general court.

Sec. 2. There shall be holden in each county two terms of the common pleas at which one of the judges of the general court (agreeably to arrangement between themselves) shall preside. The courts so to be holden² in the county of Randolph shall be holden in the town of Kaskaskia on the second Mondays in April and September, in each year, and shall continue until the business of the court is finished. The court to be holden in the county of St. Clair shall be held in the

¹ "eighteen hundred and eight."

² "The court to be holden"

town of Cahokia on the fourth Mondays in April and September, in each year, and shall continue until the business of the court is finished.

Sec. 3. *And be it [further] enacted by the authority aforesaid:* That the justices of the peace for the respective counties, or any three or more of them, shall be and they are hereby constituted a county court who shall have, possess and exercise all jurisdiction (except over suits and process of a civil and criminal nature) that has hitherto been possessed and exercised by the court of common pleas, and the said county court shall hold six terms in each year in their respective counties at the same place, at which the court of common pleas are by this act required to be holden, and at the times heretofore prescribed by an act, entitled, "An act organizing courts of common pleas," passed by the Legislature of the Indiana Territory on the seventeenth day of September, in the year eighteen hundred and seven.

Sec. 4. *Be it [further] enacted by the authority aforesaid:* That so much of any law as requires the appointment of three judges to the court of common pleas and all other laws and¹ parts of laws repugnant to this act or within the perview thereof shall and the same is hereby repealed.

The foregoing is hereby declared to be a law of the Territory, and to take effect and be in force from the date thereof.

In testimony whereof, we, Ninian Edwards, Governor, and Alexander Stuart, and Jesse B. Thomas, Judges, have hereunto signed our names at Kaskaskia, the sixteenth day of June, in the year of our Lord eighteen hundred and nine, and of the Independence of the United States the thirty-third.

NINIAN EDWARDS,
ALEXR. STUART,
JESSE B. THOMAS.

AN ACT to regulate the time of holding the general court.

*Be it enacted by the Governor and Judges of the Illinois Territory and it is hereby enacted by the authority of the same:*² That the general court shall be held two terms yearly, and every year in the town of Kaskaskia, to commence on the last Mondays in March and August and to continue until the business is finished.

¹ "or parts of law or laws" *

² "aforesaid" instead of "of the same."

The foregoing is hereby declared to be a law of the Territory to take effect and be in force from the date thereof.

In testimony whereof, we, Ninian Edwards, Governor, and Alexander Stuart and Jesse B. Thomas, Judges, have hereunto signed our names, at Kaskaskia, the sixteenth day of June in the year of our Lord eighteen hundred and nine, and of the Independence of the United States the thirty-third.

NINIAN EDWARDS,
ALEXR. STUART,
JESSE B. THOMAS.

AN ACT in addition to an act, entitled, "An act repealing certain laws and parts of laws."

SEC. 1. *Be it enacted by the Governor and Judges of the Illinois Territory and it is hereby enacted by the authority of the same:* That the second section of a law, entitled, "An act regulating the general court," passed by the General Assembly or Legislature of the Indiana Territory on the seventeenth day of September, eighteen hundred and seven, and also an act, entitled, "An act to prevent unnecessary delays in causes after issue joined," passed by the Legislature of the Indiana Territory on the seventeenth day of September, eighteen hundred and seven, be and the same are hereby repealed.

The foregoing is hereby declared to be a law of the Territory to take effect and be in force from the date thereof.

In testimony whereof, we, Ninian Edwards, Governor, and Alexander Stuart and Jesse B. Thomas, Judges, have hereunto signed our names, at Kaskaskia, the nineteenth day of June in the year of our Lord eighteen hundred and nine, and of the Independence of the United States the thirty-third.

NINIAN EDWARDS,
ALEXR. STUART,
JESSE B. THOMAS.

AN ACT concerning the general court.

SEC. 1. *Be it enacted by the Governor and Judges of the Illinois Territory and it is hereby enacted by the authority of the same:* That there shall annually be held four terms of the general court, two of which shall be held in the town of Kaskaskia, in the county of Randolph, on the second Mondays of April and September, and two shall

be held in Cahokia, in the county of St. Clair, on the fourth Mondays in April and September.

SEC. 2. The general court shall have jurisdiction, both original and final, over all suits and process of a civil and criminal nature, that was heretofore vested in, and exercised by the general court, the circuit courts and the courts of common pleas under any law or laws of the Legislature of the Indiana Territory, except in cases of appeal from the judgment of a justice of the peace where the sum does not amount to twenty dollars, exclusive of costs.¹

SEC. 3. All suits and process of a civil and criminal nature shall be tried and determined in the county in which such suit or process originated.

SEC. 4. For the convenience of the citizens of this Territory it shall be the duty of the clerk of the general court to keep one branch of his office at Kaskaskia and the other at Cahokia. All the business that pertains to the duty of clerk which may originate in the county of Randolph shall be transacted and confined to the office at Kaskaskia, and all the business that pertains to the duty of clerk which may originate in the county of St. Clair shall be transacted in and confined to the office at Cahokia.

SEC. 5. It shall be the duty of the clerk of the general court to superintend both branches of his office. He shall have power to appoint as many deputies as he may find necessary and shall be answerable for their misconduct; and all such deputies shall take a similar oath to that prescribed for the clerk.

SEC. 6. And whereas, there are many suits now depending, which originated in the courts of common pleas, and of which the general court by this law has jurisdiction: *Be it enacted by the authority aforesaid:* That the clerk of the general court shall promptly and without delay demand all the papers, exhibits, etc., in each of such suits of the clerks of the respective courts of common pleas, and it shall be their duty to deliver the same accordingly; and when the papers are thus delivered it shall be the duty of the clerk of the general court immediately so to arrange such causes on the docket as that they may come on for trial with the utmost dispatch and in the same order that they ought to have stood in the court of common pleas, had not this law been passed.

¹ The printed copy is very faulty, thus: "in each of such suits of the clerks of the respective courts of common pleas, and it shall be their duty of the clerk of the general court immediately, so to arrange, etc."

SEC. 7. *Be it further enacted:* That all process which has heretofore issued, returnable to the courts of common pleas or general court, shall be considered as properly returnable to the first sessions of the general court in the counties in which such process respectively issued, and all bails, recognizances and every kind of business, which may have been transacted under the existing laws that would have been obligatory in the courts of common pleas or general court, shall be obligatory and cognizable in like manner in the general court, as regulated by this act.

SEC. 8. The sheriff of Randolph county shall attend the general court at its terms in Kaskaskia, and shall execute all process and perform all those duties that belong to his office that may originate in the county of Randolph; and the sheriff of St. Clair county shall attend the general court at its terms in Cahokia, and shall execute all process and perform all those duties that belong to his office that may originate in the county of St. Clair.

SEC. 9. The clerks of the respective courts of common pleas shall, when thereto required, deliver to the clerk of the general court all other papers, records, etc., belonging to their respective offices, which, when delivered, shall by the clerk of the general court be kept separate and apart from the papers belonging to suits now pending in the said courts of common pleas.

SEC. 10. *Be it further enacted by the authority aforesaid:* That the first and second sections of a law passed on the sixteenth day of June, eighteen hundred and nine, entitled, "An act concerning courts of common pleas and county courts," and all other laws and parts of laws repugnant to this law, shall be, and the same are, hereby repealed.

The foregoing is hereby declared to be a law of the Territory, to take effect and be in force from the date thereof.

In testimony whereof, we, Ninian Edwards, Governor, and Alexander Stuart, Obadiah Jones and Jesse B. Thomas, Judges, have hereunto signed our names, at Kaskaskia, the twentieth day of July, in the year of our Lord one thousand eight hundred and nine, and of the Independence of the United States the thirty-fourth.

NINIAN EDWARDS,
ALEXR. STUART;
OBADIAH JONES,
JESSE B. THOMAS.

A true copy, signed, attest,
WILLIAM ARUNDEL, Clerk.

A LAW respecting arrearages due the former sheriff.

Whereas it is represented to this Legislature that the late sheriff of the county of Randolph has neglected to collect all the county levies in the said county and that several arrearages are now due to him.

Be it therefore enacted: That James Gilbreath, late sheriff of the said county of Randolph, shall at the next county court to be held¹ for the said county deliver and produce on oath to the said court a full, just and true account of all the sums which he has collected, or ought to have collected, for the use of the said county, noting therein the names of delinquents and the sums respectively due; and he shall also at the same time deliver on oath a true and perfect account of all monies by him paid for the use of the said county, stating therein the amounts paid to whom and by what authority, and produce to the said court his original vouchers and receipts therefore. And the said county court on the said sheriffs performing the requisits by this act directed shall thereupon give him a warrant under their hands and seals, authorising him to receive the amount of the said arrearages, and all fees due to him at any time within six months from the date thereof, by virtue whereof the said late sheriff shall have the same power to collect the said arrearages in the same manner he might have done under the laws of the Territory, if he had proceeded to collect the same in the time required by law.

The foregoing is hereby declared to be a law of the Territory to take effect and be in force from the date thereof.

In testimony whereof, we, Ninian Edwards, Governor, and Alexander Stuart, Obadiah Jones and Jesse B. Thomas, Judges, have hereunto signed our names the twentieth day of July, in the year of our Lord one thousand eight hundred and nine, and of the Independence of the United States thirty-fourth.

A true copy, attest,
WILLIAM ARUNDEL, *Clerk.*

NINIAN EDWARDS,
ALEXR. STUART,
OBADIAH JONES,
JESSE B. THOMAS.

AN ACT concerning county courts.

Be it enacted by the Governor and Judges of the Illinois Territory and it is hereby enacted by the authority of the same: That;

¹ "holden" for "held."

SEC. 1. The county courts for the county of Randolph shall be held in the town of Kaskaskia, and the county court for the county of St. Clair shall be held in the town of Cahokia.

SEC. 2. *Be it further enacted:* That the county courts shall have jurisdiction (in the several counties) of appeals from judgments of justices of the peace where the judgment shall not exceed twenty dollars besides costs.

SEC. 3. *Be it further enacted:* That the county courts shall sit six days at each term, if the business before the court shall require it.

The foregoing is hereby declared to be a law of the Territory to take effect and be in force from the date thereof.

In testimony whereof, we, Ninian Edwards, Governor, and Alexander Stuart, Obadiah Jones and Jesse B. Thomas, Judges, have hereunto signed our names, at Kaskaskia, the twentieth day of July, in the year of our Lord one thousand eight hundred and nine, and of the Independence of the United States the thirty-fourth.

NINIAN EDWARDS,
ALEXR. STUART,
OBADIAH JONES,
JESSE B. THOMAS.

A true copy, attest,
WILLIAM ARUNDEL, *Clerk.*

A LAW to repeal an act entitled, “A law to alter and repeal certain parts of an act entitled, ‘A law to regulate county levies,’ ” and to enforce the collection of the county levies for the year eighteen hundred and nine.

SEC. 1. *Be it enacted by the Governor and Judges of the Illinois Territory, and it is hereby enacted by the authority of the same:* That the act passed by the Indiana Legislature, entitled, “An act to alter and repeal certain parts of an act, entitled, ‘A law to regulate county levies,’ ” shall be and the same is hereby repealed.

SEC. 2. And whereas provision ought to be made by law for the collection of county levies for the present year; *Be it therefore enacted:* That the sheriffs of the several counties in this Territory shall immediately proceed to receive the lists of all and every species of property made chargeable with taxes by this act and by the law of the Territory, entitled, “A law to regulate the county levies,” in the manner required by said law, and that the said sheriffs shall make out and deliver such lists to the clerks of their respective county courts on, or before, the eighteenth day of September next; and the said clerks shall make out a true transcript thereof, which they shall lay

before their next succeeding county courts respectively, for their examination and allowances, who shall have all the powers to levy a tax upon their respective counties, which has been heretofore vested in the court of common pleas; and it shall be the duty of the sheriffs of the respective counties to proceed to the collection thereof within the times prescribed by law.

SEC. 3. *Be it further enacted:* That so much of the eleventh section of the said law as requires the courts of common pleas to appoint two free holders in each township to value and appraise such house [in town], town lot, town out-lot and mansion house in the county, and all water and windmills shall be and the same is hereby repealed; and that the sheriffs of the respective counties shall proceed to appraise and value the same in the same manner, as the said free-holders were by the said law required to do; and the said county courts, at the time when they are by this law required to lay the county tax, shall levy a sum not exceeding thirty cents on each hundred dollars of such appraised valuation.

SEC. 4. *Be it further enacted:* That so much of the thirteenth section of the said law as authorises sheriffs of the several counties to issue certificates to sell merchandize, shall be and the same is hereby repealed; and that from henceforth every possessor of merchandize shall, previously to offering the same for sale by himself or agent, pay to the sheriff as treasurer the sum of fifteen dollars for the use of the county and take his receipt therefor, which he shall take to the clerk of the county court who shall thereupon file the same and deliver to the person producing the same a certificate in the form prescribed by the said law, altering it, howsoever, so far as to mention that the tax for such certificate had been paid to the sheriff, as it appeared by his receipt delivered to the said clerk; and the said sheriffs and clerks shall keep separate accounts of the monies received and certificates issued, noting therein the dates when paid and issued and to whom, which accounts they shall deliver and produce to the county courts, when required.

SEC. 5. The sheriffs shall settle their accounts annually with their county courts at the times heretofore appointed by law; and at the time of such settlement it shall be their duty respectively to make a fair statement of all the money by them received, from whom, and on what account, and a like statement of the money by them expended, by virtue of any law or order of the court, which written statement,

after settlement with the court, shall be recorded. *Be it therefore [further] enacted by the authority aforesaid:* That such settlement or settlements shall not be a bar to a recovery thereafter against any sheriff, or sheriffs, where it shall clearly appear that he or they have been guilty of fraud or error in such settlement.

SEC. 6. The county courts in each county respectively shall at the same time, at which they are by this law required to levy the tax upon other objects of taxation, levy a tax on located lands not exceeding ten cents in the hundred dollars valuation, as made in conformity to a law of the Indiana Territory for the collection of the territorial taxes, which said tax shall be collected by the said sheriffs respectively at the same time, they are by this law required to collect the other county taxes; and the said sheriffs shall have the same powers to dispose of the whole, or so much of the said land, as shall, in default of payment, be sufficient to pay the said taxes and cost in the same manner as he is authorised to do so by the law of the Indiana Territory for the collection of the territorial tax: *Provided*, that the whole of the tax collected under this section shall be applied exclusively to county buildings.

SEC. 7. The sheriffs shall be allowed, in full compensation for their various duties under this law and the said law to regulate county levies, ten per cent upon all sums by them collected and paid.

The foregoing is hereby declared to be a law of the Territory to take effect and be in force from the date thereof.

In testimony whereof, we, Ninian Edwards, Governor, and Alexander Stuart, Obadiah Jones and Jesse B. Thomas, Judges, have hereunto signed our name, at Kaskaskia, the twentieth day of July, in the year of our Lord one thousand eight hundred and nine, and of the Independence of the United States the thirty-fourth.

A true copy, attest,
WILLIAM ARUNDEL, Clerk.

NINIAN EDWARDS,
ALEXR. STUART,
OBADIAH JONES,
JESSE B. THOMAS.

A LAW to prevent frauds and perjuries. Adopted from the Kentucky Code.

SEC. 1. *Be it enacted by the Governor and Judges of the Illinois Territory, and it is hereby enacted by the authority of the same:* That no action shall be brought whereby to charge any executor or administrator, upon any special promise, to answer any debt or dam-

ages [out] of his own estate, or whereby to charge the defendants upon any special promise to answer for the debt, default or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract for the sale of lands, tenements or hereditaments, or the making any lease for a longer term than one year, or upon any agreement which is not to be performed within the space of one year from the making thereof, unless the promise or agreement, upon which such action shall be brought, or some memorandum or note thereon, shall be in writing and signed by the party to be charged therewith or some other person by him thereunto lawfully authorised.

SEC. 2. Every gift, grant or conveyance of lands, tenements or hereditaments, goods or chattels, or of any rent, common or profit of the same, by writing or otherwise, and every bond, suit, judgment or execution had, or made and contrived of malice, fraud, covin, collusion or guile to the intent or purpose to delay, hinder or defraud creditors of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures, or to defraud or deceive those who shall purchase the same lands, tenements or hereditaments, or any rent, profit or commodity out of them, shall be from thenceforth deemed and taken (only as against the person or persons, his, her, or their heirs, successors, executors, administrators or assigns, and every of them, whose debts, suits, demands, estates and interest by such guileful and covinous devices and practices as aforesaid shall or might be in anywise disturbed, hindered, delayed or defrauded) to be clearly and utterly void; any pretence, color, feigned consideration, expressing of use or any other matter or thing to the contrary notwithstanding; and, moreover, if a conveyance be of goods and chattels and be not on consideration deemed valuable in law, it shall be taken to be fraudulent within this act; unless the same be by will duly proved and recorded; or by deed in writing, acknowledged or proved, if the same deeds include lands also, in such manner as conveyances of land are by law directed to be acknowledged, or proved; or if it be of goods and chattels only, then acknowledged or proved by two witnesses in any court of record in the county, wherein one of the parties lives, within eight months after the execution thereof; or unless possession shall really and *bona fide* remain with the donee; and in like manner where any loan of goods and chattels shall pretended to have been made to any person, with whom, or those claiming under him,

possession shall have remained by the space of five years, without demand made or pursued by due process of law, on the part of the pretended lender; or where any reservation or limitation shall be pretended to have been made of an use or property by way of condition, reversion, remainder or otherwise in goods and chattels, the possession whereof shall have remained in another as aforesaid; the same shall be taken as to the creditors and purchasers of the persons aforesaid so remaining in possession to be fraudulent within this act, and that the absolute property is with the possession, unless such loan, reservation or limitation of use or property were declared by will or deed in writing proved and recorded as aforesaid.

SEC. 3. This act shall not extend to any estate or interest in any lands, goods or chattels or any rents, common or profit out of the same, which be upon good consideration and *bona fide* law fully conveyed or assured to any person or persons, bodies politic or corporate.

The foregoing is hereby declared to be a law of the Territory to take effect and be in force from the date thereof.

In testimony whereof, we, Ninian Edwards, Governor, and Alexander Stuart, Obadiah Jones and Jesse B. Thomas, Judges, have hereunto set our names, at Kaskaskia, the twenty-first day of July in the year of our Lord one thousand eight hundred and nine, and of the Independence of the United States the thirty-fourth.

A true copy, attest,
WILLIAM ARUNDEL, *Clerk*.

NINIAN EDWARDS,
ALEXR. STUART,
OBADIAH JONES,
JESSE B. THOMAS.

AN ACT concerning certain fees in the general court.

SEC. 1. *Be it enacted by the Governor and Judges of the Illinois Territory and it is hereby enacted by the authority of the same:* That all suitors and others having business to do in the general court shall pay the same fees (for the use of the territorial government) as have heretofore been paid by suitors and others for the like services performed by the courts of common pleas and applied to the use of their respective counties.

SEC. 2. *And be it further enacted by the authority aforesaid:* That the offices of government shall have the same power to collect such fees, as hath heretofore been authorised by law, for the recovery and collection of the like fees, imposed by the courts of common pleas for [the use of] their counties respectively, and the officer receiving

the same shall be liable to be proceeded against as in other cases of the like nature.

The foregoing is hereby declared to be a law of the Territory to take effect and be in force from the date thereof.

In testimony whereof, we, Ninian Edwards, Governor, and Alexander Stuart, Obadiah Jones and Jesse B. Thomas, Judges, have hereunto set our names, the twenty-first day of July in the year of our Lord one thousand eight hundred and nine, and of the Independence of the United States the thirty-fourth.

NINIAN EDWARDS,
ALEXR. STUART,
OBADIAH JONES,
JESSE B. THOMAS.

A true copy, attest,
WILLIAM ARUNDEL, *Clerk*.

AN ACT *appropriating fines, amerciaments, penalties, forfeitures and taxes imposed on law process to the use of the territorial government.*

SEC. 1. *Be it enacted by the Governor and Judges of the Illinois Territory and it is hereby enacted by the authority of the same:* That all taxes imposed by law process, and all fines, amerciaments, forfeitures and penalties imposed or recorded in the general court shall constitute a fund to defray the expenses of the territorial government.

SEC. 2. That the sheriff of each county shall settle their accounts with the general court at the spring term annually, in the same manner and subject to their same conditions as is prescribed by law for the settlement of their accounts by the county court.

SEC. 3. *Be it further enacted:* That the governor and Judges, or a majority of them, shall have power to draw warrants to defray expenses incurred by the territorial government, whether they be legal or contingent, upon any person or persons having in his or their possession any money by this act appropriated to the use of the Territory.

The foregoing is hereby declared to be a law of the Territory to take effect and be in force from the date thereof.

In testimony whereof, we, Ninian Edwards, Governor, Alexander Stuart, Obadiah Jones and Jesse B. Thomas, Judges, have hereunto signed our names, at Kaskaskia, the twenty-first day of July in the

year of our Lord one thousand eight hundred and nine, and of the Independence of the United States the thirty-fourth.

A true copy, attest,
WILLIAM ARUNDEL, *Clerk*.

NINIAN EDWARDS,
ALEXR. STUART,
OBADIAH JONES,
JESSE B. THOMAS.

AN ACT to authorise the guarding of county jails. *Adopted from the Kentucky code.*

SEC. 1. *Be it enacted by the Governor and Judges of the Illinois Territory and it is hereby enacted by the authority of the same:* That if for want of a sufficient jail in any county in which a general court is held, it shall [be] necessary to impress or hire guards for the safe-keeping of any prisoner in the said jail, the general court, or a judge thereof in vacation, shall have full power and authority to order the jailor to impress or hire such guards, and the said court shall certify to the court the amount of the allowance to the said guard which it shall be the duty of the justices of the said county court to order to be paid out of the county levy.

SEC. 2. To prevent doubts what shall be taken to be a sufficient jail: *Be it further enacted by the authority aforesaid:* That, when the judges of the general court shall receive a county jail for the county and cause the same to be entered on their record, the county thereafter shall be no longer chargeable for the expense of the guards.

The foregoing is hereby declared to be a law of the Territory to take effect and be in force from the date thereof.

In testimony whereof, we, Ninian Edwards, Governor, and Alexander Stuart, Obadiah Jones and Jesse B. Stuart [*sic*], Judges, have hereunto signed their names, at Kaskaskia, the twenty-second day of July, in the year of our Lord one thousand eight hundred and nine, and of the Independence of the United States the thirty-fourth.

NINIAN EDWARDS,
ALEXR. STUART,
OBADIAH JONES,
JESSE B. THOMAS.

A true copy, attest,
WILLIAM ARUNDEL, *Clerk*.

A LAW giving the sheriff of the county of Randolph further time to make out and deliver a list of persons and property liable to taxation in the said county for the year eighteen hundred and nine and to give him further time for the collection thereof.

Whereas the time given to the sheriff of the county of Randolph by a law entitled, "A law to levy, assess and collect the county rates and levies for the year eighteen hundred and nine," has been found too short. For remedy whereof:

SEC. 1. *Be it enacted by the Governor and Judges of the Illinois Territory and it is hereby enacted by the authority of the same:* That the sheriff of the said county of Randolph shall have further time until the twenty-fifth day of this instant December to make out and deliver to the clerk of the county court of the said county complete lists and vouchers of persons and property liable to taxation in the said county for the year, eighteen hundred and nine; which lists the clerk of the said court shall file in his office, and make a transcript thereof, on, or before, the fourth day of January next and deliver the same to the justices of the county court (who shall meet together on that day at the court-house in Kaskaskia) for their examination and allowance. The bill of tax, being allowed by the said court, they shall thereto annex their warrant under the hand and seal of the presiding justice; and the clerk of the said court shall, five days thereafter, deliver the same to the sheriff for collection; and the said sheriff shall on, or before, the tenth day of March next collect the amount of the tax so laid.

SEC. 2. *And be it further enacted:* That the said sheriff shall proceed in the collection of the said taxes, and shall have the same power and authority to enforce the payment thereof as are provided by law.

This act shall be in force from the passage thereof.

In testimony whereof, we, Ninian Edwards, Governor, and Alexander Stuart, Obadiah Jones and Jesse B. Thomas, Judges, have hereunto signed our names, at Kaskaskia, the twenty-second day of December in the year of our Lord one thousand eight hundred and nine, and of the Independence of the United States the thirty-fourth.

NINIAN EDWARDS,
ALEX. STUART,
OBADIAH JONES,
JESSE B. THOMAS.

A true copy, attest,
WILLIAM ARUNDEL, *Clerk.*

AN ACT concerning appeals from the judgment of justices of the peace to the county courts. Adopted from the Kentucky Code.

Be it enacted by the Governor and Judges of the Illinois Territory, and it is hereby enacted by the authority of the same:

SEC. 1. All judgments given by any such justice or justices, when the amount thereof shall not exceed four dollars sixteen cents and two-thirds of a cent, shall be final. In all judgments, where the amount thereof shall exceed four dollars sixteen cents and two-thirds of a cent, the party against whom such judgment shall be given shall have a right to appeal from the same to the next county court to be held for the county, wherein the judgment was rendered: *Provided*, there be ten days between granting the judgment from which the appeal is made and the sitting of the court. Whereupon the justice or justices, who gave such judgment, shall suspend all further proceedings thereon, and shall return the papers and the judgment he had given to the clerk of the said court; and the said court shall thereupon, at their next session, hear and determine the same in a summary way, without pleading in writing, according to the justice of the case; unless the said court, for good cause to them shown, shall continue the same to the next court, beyond which second court such appeal upon no pretense shall be continued, and execution may be taken out on a judgment given by said court on such appeal in the same manner as if the cause had been originally instituted in the said court; and in all cases when any party may desire to appeal from judgment of a justice pursuant to this act, he shall receive from the justice a copy of such judgment, and produce the same to the clerk of the county court, who shall enter into a bond in the office of such clerk in a penalty double the sum of such judgment with security, who shall be approved of by the justice from whose judgment the appeal is made. Such bond shall be conditioned for the payment of the debt and costs in case the judgment shall be confirmed on the trial of the appeal. Upon the execution of such bond, the clerk shall certify the same to the magistrate and constable, enjoining further proceedings, and issue a summons to the appellee to appear at the court to which the appeal is returned, noting the day the same shall be set for trial by the clerk. The constable shall summon the appellee, his agent or attorney, if within the county, which summons shall be executed ten days before the court wherein the same shall be tried.

SEC. 2. Where the appellee shall reside in another county, the clerk of the court, to which the appeal is made, shall have power and authority to issue a summons to cause such appellee to appear before the court; which summons shall be executed by the appellant, or

some other person for him on the appellee, and satisfactory proof of the service shall be made to the court to which the summons shall be returned; and if the appellant shall neglect to execute or cause to be executed such summons on the appellee, before the second court after praying an appeal, the judgment of the justice shall stand confirmed.

SEC. 3. It shall be the duty of the justice, who gave the judgment, to lodge with the clerk at, or before, the next court any papers produced and read on the trial before him; and if no papers, to certify the same to the clerk noting therein all the costs. The clerk shall docket the same in order. The court shall proceed and determine the appeal in a summary way at their next court and give such judgment as to them shall seem just with respect to the costs as well as the debt; but may grant a continuance, if they deem it right, to the next term but not longer; and in all appeals from the judgment of a single justice, the parties shall have the benefit of all legal testimony that can be produced.

The foregoing is hereby declared to be a law of this Territory, and to take effect from the date thereof.

In testimony whereof, we, Ninian Edwards, Governor, and Jesse B. Thomas, Alexander Stuart and Obadiah Jones, Judges, have hereunto signed our names, at Kaskaskia, the twenty-sixth day of January, in the year of our Lord one thousand eight hundred and ten, and of the Independence of the United States the thirty-fourth.

A true copy, attest,
WILLIAM ARUNDEL, Clerk.

NINIAN EDWARDS,
ALEX. STUART,
OBADIAH JONES,
JESSE B. THOMAS.

AN ACT concerning the clerks of the county courts.

Be it enacted by the Governor and Judges of the Illinois Territory, and it is hereby enacted by the authority of the same: That all duties hitherto required by law to be performed by the clerks of the courts of common pleas, shall be performed by the clerks of the county courts, except those which necessarily belong to the clerk of the general court by virtue of the duties which are assigned to him, any law to the contrary notwithstanding.

The foregoing is hereby declared to be a law of the Territory and to take effect from the date thereof.

In testimony whereof, we, Ninian Edwards, Governor, and Alexander Stuart and Jesse B. Thomas, Judges, have hereunto signed

our names, at Kaskaskia, this twenty-sixth day of January, in the year of our Lord one thousand eight hundred and ten, and of the Independence of the United States the thirty-fourth.

A true copy, attest,
WILLIAM ARUNDEL, Clerk.

NINIAN EDWARDS,
JESSE B. THOMAS,
ALEXR. STUART,
OBADIAH JONES.

AN ACT *repealing part of a law, entitled, "A law for the prevention of vice and immorality."*

Be it enacted by the Governor and Judges of the Illinois Territory, and it is hereby enacted by the authority of the same: That so much of the act, entitled, "An act for the prevention of vice and immorality," as requires the same to be executed by the judges of the supreme or general court, except when the same may come before them when sitting as a court, shall be, and the same is, hereby repealed.

The foregoing is hereby declared to be a law of the Territory and to take effect from the date thereof.

In testimony whereof, we, Ninian Edwards, Governor, and Alexander Stuart, Obadiah Jones and Jesse B. Thomas, Judges, have hereunto signed our names, at Kaskaskia, this twenty-sixth day of January, in the year of our Lord one thousand eight hundred and ten, and of the Independence of the United States the thirty-fourth.

A true copy, attest,
WILLIAM ARUNDEL, Clerk.

NINIAN EDWARDS,
JESSE B. THOMAS,
ALEXR. STUART,
OBADIAH JONES.

[AN ACT] *concerning fornication and adultery. Adopted from the Georgia code.*

Be it enacted by the Governor and Judges of the Illinois Territory, and it is hereby enacted by the authority of the same:

Whereas it is highly injurious in civilized society, that man or woman shall live in adultery or fornication together,

Be it enacted: That from and after the passing of this act, that any man or woman who shall live together in like manner, it shall be the duty of any of the neighboring justices, if within their knowledge, or upon information to them on oath, that such man and woman do live in adultery or fornication, shall thereupon cause the said man and

woman to be brought before them, or either of them; whose duty it shall be to bind them over to appear at the next superior court; and the attorney or solicitor general shall then and there prefer a bill of indictment against both the man and the woman, and on conviction thereof, they shall pay for the first offence a sum not exceeding forty eight dollars; and for the second offence a sum not exceeding one hundred and twenty dollars; and for the third offence a sum not exceeding three hundred and sixty dollars; and stand commuted to jail, until all, and every of the several sums imposed as aforesaid, shall be paid, or continue therein not exceeding twelve months.

The foregoing is hereby declared to be a law of this Territory and to take effect from the date thereof.

In testimony whereof, we, Ninian Edwards, Governor, and Jesse B. Thomas, Alexander Stuart and Obadiah Jones, Judges, have heretofore signed our names, at Kaskaskia, this twenty-sixth day of January, in the year of our Lord one thousand eight hundred and ten, and of the Independence of the United States the thirty-fourth.

NINIAN EDWARDS,
JESSE B. THOMAS,
ALEXR. STUART,
OBADIAH JONES.

AN ACT regulating the manner of taking depositions. Adopted from the Georgia code.

Be it enacted by the Governor and Judges of the Illinois Territory, and it is hereby enacted by the authority of the same: That where any witness resides out of the Territory, or out of any county in which his testimony may be required in any cause, it shall be lawful for either party, on giving at least ten day's notice to the adverse party, or his, her or their attorney, accompanied with a copy of the interrogatories intended to be exhibited, to obtain a commission from clerk of the court in which the same may be required, directed to certain commissioners to examine all and every such witness on such interrogatories as the parties may exhibit; and such examination shall be read at the trial, on motion of either party.

The foregoing is hereby declared to be a law of this Territory, and to take effect from the first day of May next.

In testimony whereof, we, Ninian Edwards, Governor, and Jesse B. Thomas, Alexander Stuart and Obadiah Jones, Judges, have here-

unto signed our names, at Kaskaskia, the twenty-sixth day of February, in the year of our Lord one thousand eight hundred and ten, and of the Independence of the United States the thirty-fourth.

A true copy, attest,
WILLIAM ARUNDEL, *Clerk.*

NINIAN EDWARDS,
JESSE B. THOMAS,
ALEXR. STUART,
OBADIAH JONES

AN ACT *prescribing the duty of sheriffs in a certain case. Adopted from the Georgia code.*

Be it enacted by the Governor and Judges of the Illinois Territory, and it is hereby enacted by the authority of the same: That where any sheriff shall levy an execution on property claimed by any person not a party to such execution, such person shall make oath to such property; and it shall be the duty of the sheriff to postpone the sale or future execution of the judgment, until the next term of the court from whence the execution issued; and such court shall cause the right of property to be decided on by a jury at the same term; unless special cause be shewn to induce the court to continue the same for one term and no longer: *Provided*, the person claiming such property, or his attorney, shall give bond to the sheriff with security in a sum equal to the amount of the execution, conditioned to pay the plaintiff all damages, which the jury on the trial of the right of property may assess against him, in case it should appear that such claim was made for the purpose of delay. And every juror on the trial of such claim shall be sworn, in addition to the oath usually administered, to give such damages, not less than ten per cent, as may seem reasonable and just, to the plaintiff against the claimant, in case it shall be sufficiently shewn that such claim was intended for delay only. And it shall be lawful for such jury to give a verdict in manner aforesaid, by virtue whereof judgment may be entered up and execution issued against such claimant, and, *Provided also*, the burthen of the proof shall lay on the plaintiff in execution.

The foregoing is hereby declared to be a law of this Territory and to take effect from the first day of May next.

In testimony whereof, we, Ninian Edwards, Governor, and Jesse B. Thomas, Alexander Stuart and Obadiah Jones, Judges, have hereunto signed our names, at Kaskaskia, the twenty-sixth day of February, in the year of our Lord one thousand eight hundred and ten, and

of the Independence of the United States the thirty fourth.

A true copy, attest,
WILLIAM ARUNDEL, *Clerk*.

NINIAN EDWARDS,
JESSE B. THOMAS,
ALEXR. STUART,
OBADIAH JONES.

AN ACT to repeal part of an act of the General Assembly of the Indiana Territory passed the seventeenth day of September, in the year one thousand eight hundred and seven, entitled, "An act respecting crimes and punishments."

Be it enacted by the Governor and Judges of the Illinois Territory, and it is hereby enacted by the authority of the same: That from, and after, the first day of May next, so much of the act of the Indiana Legislature entitled, "An act respecting crimes and punishments," as relates to burglary, robbery and perjury, shall be and the same is hereby repealed.

Be it further enacted: That from, and after, the first day of May next, so much of the before recited act, as prescribes any limitation of the time, in which prosecutions for forgery, perjury or any felony, shall be commenced, shall be and the same is hereby repealed.

In testimony whereof, we, Ninian Edwards, Governor, and Jesse B. Thomas, Alexander Stuart and Obadiah Jones, Judges, have hereunto signed our names, at Kaskaskia, this twenty-seventh day of February, in the year of our Lord one thousand eight hundred and ten, and of the Independence of the United States the thirty-fourth.

A true copy, attest,
WILLIAM ARUNDEL, *Clerk*.

NINIAN EDWARDS,
JESSE B. THOMAS,
ALEXR. STUART,
OBADIAH JONES.

AN ACT repealing part of an act entitled, "An act concerning appeals, from the judgment of justices of the peace to the county courts."

Be it enacted by the Governor and Judges of the Illinois Territory, and it is hereby enacted by the authority of the same: That so much of the said act as authorises the county court to decide on appeals from the judgment of justices of the peace for any sum exceeding twenty dollars, exclusive of costs, is hereby repealed.

This act to take effect from the date thereof.

In testimony whereof, we, Ninian Edwards, Governor, and Jesse

B. Thomas, Alexander Stuart and Obadiah Jones, Judges, have hereto signed our names, at Kaskaskia, this twenty-seventh day of February, in the year of our Lord one thousand eight hundred and ten, and of the Independence of the United States the thirty-fourth.

A true copy, attest,
WILLIAM ARUNDEL, *Clerk*

NINIAN EDWARDS,
JESSE B. THOMAS,
ALEXR. STUART,
OBADIAH JONES.

A LAW concerning grand jurors. Adopted from the Kentucky Code.

Be it enacted by the Governor and Judges of the Illinois Territory, and it is hereby enacted by the authority of the same: [That] the sheriff of each county, where a superior court of criminal jurisdiction is appointed to be holden, shall before every meeting of such court summon twenty-four of the most discreet housekeepers, residing within the limits of the jurisdiction of the said court, to appear at the succeeding court, on the first day thereof; and the said twenty-four housekeepers, or any sixteen of them, shall be a grand jury, who shall be sworn to enquire of and present all treasons, felonies, murders and other misdemeanors whatsoever, which shall have been committed or done within the limits of the jurisdiction of the said court. And if a sufficient number of the said housekeepers shall not attend on the first day of the court, the sheriff shall summon from the by-standing housekeepers of the description aforesaid a sufficient number, together with those attending, to make a jury.

The foregoing is hereby declared to be a law of the Territory, and to take effect from the date thereof.

In testimony whereof, we, Ninian Edwards, Governor, and Jesse B. Thomas, Alexander Stuart and Obadiah Jones, Judges, have hereto signed our names, at Kaskaskia, this third day of March, in the year of our Lord one thousand eight hundred and ten, and of the Independence of the United States the thirty-fourth.

A true copy, attest,
WILLIAM ARUNDEL, *Clerk*.

NINIAN EDWARDS,
JESSE B. THOMAS,
ALEXR. STUART,
OBADIAH JONES.

AN ACT to prevent unlawful gaming. Adopted from the Virginia Code.

Be it enacted by the Governor and Judges of the Illinois Territory, and it is hereby enacted by the authority of the same:

SEC. 1. That all promises, agreements, notes, bills, bonds, or other contracts, judgments, mortgages, or other securities or conveyances whatsoever, made, given, granted, drawn or entered into or executed by any person or persons whatsoever, after passing this act, where the whole, or any part, of the consideration of such promise, agreement, conveyances or securities shall be for money or other valuable thing whatsoever, won, laid or betted at cards, dice, tables, tennis, bowles or any other game or games whatsoever, or at any horse race, cock fighting, or any other sport or pastime, or on any wager whatsoever, or for the reimbursing or repaying any money, knowingly lent or advanced at the time and place of such play, horse racing, cock fighting, or other sport or pastime, to any person or persons so gaming, betting, or wagering, or that shall at such time and place, so play, bet or wager, shall be utterly void and of none effect, to all intents and purposes whatsoever; any law, custom or usage to the contrary thereof in anywise notwithstanding.

SEC. 2. Any conveyance, or lease of lands, tenements or hereditaments, sold, demised or mortgaged, and any sale, mortgage, or other transfer of slaves or other personal estate, to any person, or for his use to satisfy or secure money, or other thing by him won of, or lent or advanced to the seller, lessor or mortgagor, or whereof money or other thing so won, or lent or advanced, shall be part or all of the consideration money, shall inure to the use of the heirs of such mortgagor, lessor, bargainor or vender, and shall vest the whole estate and interest of such person in the lands, tenements or hereditaments so leased, mortgaged, bargained or sold, and in the slaves, or other personal estate, so sold, mortgaged or otherwise transferred, to all intents and purposes, in the heirs of such lessor, bargainor, mortgagor or vender, as if such lessor, bargainor, mortgagor or vender had died intestate.

SEC. 3. If any person, or persons, whatsoever at any time hereafter within the space of twenty-four hours by playing at any game or games whatsoever, or by betting on the sides or hands of such as do play at any game or games, shall lose to any one, or more person or persons, so playing or betting, the sum or value of seven dollars or

more in the whole, and shall pay or deliver the same or any part thereof, the person, or persons, so losing, and paying or delivering the same shall be at liberty within three months then next following to sue for and recover the money or goods so lost, and paid or delivered, or any part thereof, from the respective winner or winners thereof with costs of suit, by action of debt founded on this act, to be prosecuted in any court of record in this Territory, where the sum or value thereof shall be cognizable; in which action it shall be sufficient for the plaintiff to allege that the defendant is indebted to the plaintiff, or received to the plaintiff's use, the money so lost, and paid or converted the goods won of the plaintiffs to the defendants use, whereby the plaintiff's accrued to him according to the form of this act, without setting forth the special matter; and in case the party losing such money, or other thing, as aforesaid, shall not within the time aforesaid, really and *bona fide*, without covin or collusion, sue and with effect prosecute for the money, or other thing so lost and paid or delivered, it shall and may be lawful to and for any other person, or persons, by any such action or suit as aforesaid, to sue for and recover the same, and treble the value thereof, with costs of suit, against such winner, or winners, as aforesaid, the one moiety thereof to the use of the person, or persons, suing for the same and the other moiety to the use of the Territory.

SEC. 4. *Provided, always*, that upon discovery and repayment of the money, or other thing, so to be discovered and repayed as aforesaid, the person and persons discovering and repaying the same, shall be acquitted, indemnified and discharged from any further or other forfeiture, punishment or penalty, which he or they may have incurred by the playing for, or winning, such money or other thing so discovered and repaid.

SEC. 5. And to prevent gaming at ordinaries and other public places, which must be often attended with quarrels, disputes and controversies, the impoverishment of many people and their families, and the ruin of health, and corruption of the manners of youth, who upon such occasion frequently fall in company with lew'd, idle and dissolute persons, who have no other way of maintaining themselves but by gaming; *Be it further enacted*: that if any person or persons shall at any time play in an ordinary, race field or any other public place, at any game or games whatsoever, except billiards, bowles, back gammon, chess or draughts, or shall bet on the sides or hands of

such as do game, every such person upon conviction thereof before any justice of the peace in any county within this Territory by the oath of one or more credible witness or witnesses, (which oath the said justice is hereby empowered to administer) or by the view of such justice, or the confession of the party accused, shall forfeit and pay twenty dollars to be levied by distress and sale of the offender's goods, by warrant under the hand of the justice, before whom such conviction shall be, and for the use of the county wherein such offence shall be committed; and moreover, every person so convicted shall be committed to the county jail, there to remain until he, she or they give sufficient security for his, her or their good behaviour for twelve months next after such conviction.

SEC. 6. If any, person by playing or betting at any game or wager whatsoever, at any time within the space of twenty-four hours, shall lose or win to or from another, a greater sum, or anything of greater value, than twenty dollars, the loser and winner shall be liable to pay one-half of the entire sum above the said sum of twenty dollars, which he shall so win or lose; and upon information thereof made to the general court and due proof thereof had, such general court shall levy upon the goods and chattels of the offenders the full penalty incurred, which shall be applied to the use of the Territory.

SEC. 7. And whereas, divers lew'd and dissolute persons live at great expenses, having no visible estate, profession or calling to support them, but by gaming only; *Be it therefore enacted*: that it shall be lawful for any two justices of the peace in any county to cause to come, or be brought, before them every person within their respective limits, whom they shall have just cause to suspect to have no visible estate, profession or calling to maintain himself by, but for the most part supporting himself by gaming; and if such person shall not make it appear to such justices that the principal part of his expenses is not maintained by gaming, they shall require of him sufficient securities for his good behaviour for the space of twelve months; and on refusal thereof shall commit him to the common jail, there to remain until he shall find such securities; and if such person shall give such securities, and afterwards within that time shall play or bet for any money or other valuable thing whatsoever, such playing or betting shall be a breach of the behaviour, and a forfeiture of the recognizance given for the same.

SEC. 8. *And be it further enacted*: that if any person, or persons,

whatsoever, do or shall at any time or times by any fraud, shift, cozenage, circumvention, deceit, unlawful device or evil practice whatsoever, in playing at, or with, cards, dice, or any other game or games, or in or by bearing a share or part in the stakes, wagers or adventures, or in or by betting on the sides or hands of such as do, or shall play, win, obtain, or acquire to him or themselves, or to any other or others, any sum or sums of money, or other valuable thing or things, whatsoever, every person so winning by such ill practice, and being thereof convicted upon indictment or information, shall forfeit five times the value of the money, or other things, so won, and suffer such corporal punishment as in cases of wilful perjury; and such penalty shall be recoverable with costs by any person or persons, suing for the same by action of debt in any court of record in this Territory having cognizance thereof.

SEC. 9. *Provided always*, that any person agrieved by the judgment of any justice of the peace upon any conviction for any of the offences in this act cognizable before him, may appeal to the next general court to be held for the county, where such person shall be convicted; but shall give reasonable notice of such appeal to the party, prosecuting him or her, and shall also enter into recognizance with two sufficient securities before some justice of the county, wherein the judgment was given on condition to try such appeal at the next general court held for said county after entering such appeal which shall be by the said court then heard and finally determined: *Provided*, that no such judgment shall be set aside for want of form, wherein it shall appear to the court that the facts were sufficiently proved at the trial.

SEC. 10. All and every keeper or keepers, exhibitor, or exhibitors, of either of the gaming tables, commonly called A, B. C or E O tables or of a farro bank, or any other gaming table, or bank of the same or the like kind, under any denomination whatever, shall be deemed and treated as vagrants; and moreover, it shall and may be lawful for any justice of the peace by warrant under his hand to order any such gaming table to be seized and publicly burnt or destroyed.

SEC. 11. No person in order to raise money for himself or another shall publicly or privately put up a lottery of blanks and prizes to be drawn or adventured for, or any prize or thing to be raffled or played for, and whoever shall offend herein shall forfeit the whole sum of

money proposed to be raised by such lottery, raffling, or playing to the use of the Territory.

SEC. 12. That all monies exhibited for the purpose of alluring persons to bet against, at any game, and all moneys actually staked or betted whatsoever, shall be liable to seizure by any magistrate or magistrates, or by any other person or persons under a warrant from a magistrate, wheresoever the same may be found; and all such monies so seized shall be accounted for and paid by the person, or persons, making the seizure to the court of the county, wherein the seizure shall be made, and applied by the court in aid of the levies, deducting thereout fifty *per centum* upon all monies so seized to be paid to the person, or persons, making the said seizure.

SEC. 13. Any person whatsoever, who shall suffer any of the games played at the tables commonly called A. B. C. or E O or farro bank, or any other gaming table or bank of the same or the like kind, under any denomination whatever, to be played in his or her house or in a house, of which he or her hath at the time the use or possession, shall for every such offence forfeit and pay the sum of one hundred and fifty dollars to be recovered in any court of record by any person who will sue for the same.

SEC. 14. Whenever a judgment shall be obtained for any fine incurred by a breach of any law for preventing gaming, twenty dollars shall be taxed in the bill of costs for a lawyer's fee.

SEC. 15. Any person, or persons, who shall oppose the seizure of such monies as above described by any person, or persons, so authorised to make it, shall be liable to a penalty of fifteen hundred dollars, to be recovered in any court of record for the use of the Territory, and shall be moreover liable to the action of any party grieved by such opposition; and any person or persons, who shall take or carry away any part of the said money after the said seizure, shall be declared, shall be guilty of a misdemeanor.

SEC. 16. That every fine for forfeiture and penalty, imposed, declared, inflicted or incurred, or which may be imposed, declared, inflicted or incurred, for the use of the Territory, under any act, or part or parts of any act, heretofore made, for the prevention or discouragement of any kind of unlawful gaming or for the suppression thereof, shall and may be recovered in the general court in this Territory upon presentment or indictment by a grand jury, or upon information filed by the attorney general in said court, or by action of debt, bill, plaint,

or any other legal ways or means whatsoever; and in every such case no exception shall be admitted or sustained for any defect or want of form, in any presentment, indictment, information, or other suit or action whatsoever, which may be brought or instituted on behalf of the Territory, or of any person, or persons, entitled to sue for the same, either on his own behalf, or on behalf of such person or the Territory; but the court, before whom any such presentment, indictment, information, suit or action shall be brought, shall proceed to give judgment according to the very right of the case, any former law, custom or usage to the contrary notwithstanding.

SEC. 17. And for the prevention of unnecessary delays in the prosecution of offenders; *Be it further enacted:* That where any presentment or indictment authorised by this, or any other act, shall be made by a grand jury, the court, wherein the same shall be made, shall immediately order the proper process to bring the offender before them, returnable with all convenient expedition, which process may be directed to the sheriff, or other officer, of any county within this Territory, where the offender or offenders may be found, and such sheriff, or other officer, to whom the same shall be directed, is hereby empowered and required to execute the same, and make return thereof to the court from which it issued; and if the defendant, being duly summoned, shall fail to appear, and plead to such presentment or indictment immediately, the court shall forthwith proceed to give judgment against him in the same manner as if he had appeared and confessed the charge, or denying it, had been found guilty by the verdict of a jury, and may award execution against him accordingly; but if he shall appear and plead not guilty to the presentment or indictment, the court shall without delay proceed to the trial and render judgment according to the very right of the case, as herein before directed; and whereupon any rule to shew cause why an information should not be filed by the attorney for the Territory, the defendant shall fail to appear and shew cause, pursuant to the notice duly given him, or left at his usual place of abode, in every such case, if the information be thereafter filed, the court may on any day after the day of shewing cause, proceed to give judgment upon such information, in the same manner as upon presentment or indictment by a grand jury. *Provided, nevertheless,* that if the offender, against whom any judgment may be rendered, for want of his appearing to answer the presentment or indictment or to shew cause against the filing of the information,

shall at any time during the same term, appear and surrender himself in custody, or give bail, being ruled so to do by the court, for his appearance when required and plead not guilty to the presentment, indictment or information, it shall be lawful for the court in every such case to set aside the judgment against him, and thereupon the court shall, without delay, proceed to the trial in the same manner, as if he had appeared and pleaded there in the first instance; and shall render judgment thereupon according to the very right of the case without regard to any exception that may be alleged against it.

SEC. 18. Whenever judgment shall be rendered against any offender by virtue of this act, if he be not present, the court may award a *capias* for the fine, and also to bring the body of the offender before the court in order to be dealt with as the law directs; which *capias* may be directed to the sheriff, or other officer, of any county within this Territory, where the offender may be found, and such sheriff or other officer, to whom the same shall be directed, is hereby empowered and required to execute the same and make return thereof to the court from which it issued; and upon every such *capias*, the sheriff or other officer shall take good and sufficient bail in a sum not exceeding five hundred dollars, nor less than two hundred dollars, for the appearance of the defendant on the first day of the next court; and if he shall fail to take such bail, he shall forfeit a sum not exceeding five hundred dollars to the Territory; and if the defendant being bailed shall fail to appear accordingly, the bail bond shall be forfeited and shall immediately be put in suit, and the clerk shall endorse upon the writ that bail is required.

SEC. 19. And for the removing certain doubts, which have arisen, in the construction of some of the acts, or parts of acts, made for the preventing, discouraging and suppressing unlawful gaming; *Be it further enacted and declared:* That every house of entertainment, or public resort, within this Territory, whether the same be a licensed tavern or not, shall be deemed and taken to be a tavern, and the owner, master, keeper or occupier of every such house, shall be deemed a tavern keeper within the true intent and meaning of this act; and the owner, master, keeper or occupier of any tavern, licensed or unlicensed, shall moreover be deemed to be the owner, master, keeper and occupier of every house, out-house, booth, arbor, garden and other place within the curtilage of the principal house, tavern, messuage or tenement, or in any wise appurtenant thereto, or at any time held there-

with, and every such house, out-house, booth, arbor, garden and other place shall be considered as part of the tavern, unless the same shall have been *bone fide* leased to some other person by deed, indented and recorded previous to the time of any offence against any act for preventing unlawful gaming, or for regulating ordinaries and restraint of tippling houses, committed therein for a term not less than twelve months from the day of the date of such lease and for a valuable consideration *bone fide* paid, or secured to be paid, and unless the lessor and his family shall *bone fide* dwell and board therein, and not elsewhere; and if any such lease or pretended lease be made or recorded, and the lessee shall not actually dwell and board himself and family in the house or premises so demised, or pretended to be demised; or if the lessee shall directly or indirectly board or diet himself elsewhere; every such lease or demise shall be taken to be fraudulent within this act, and both the lessor and lessee and his assigns shall be liable to the same pains, penalties, fines, forfeitures and judgments, as if he or they or either of them were tavern keepers, and occupiers of the premises so leased or demised, and judgment against the one, shall be no bar or impediment to a prosecution, judgment and recovery against the other for any offence committed within the same, contrary to the true intent and meaning of this act, or of any other act or acts, or part of any act or acts, for preventing, discouraging or suppressing unlawful gaming.

SEC. 20. *And be it further enacted:* That every keeper or exhibitor of any of the tables commonly called A. B. C. or E. O. tables, or farro bank, or any other gaming table of the same or like kind under any denomination whatsoever, or whether the same be played with cards, or dice or in any other manner whatever, and every unlicensed tavern keeper, who shall suffer any unlawful gaming upon any part of the premises in his, or her, occupation, shall in addition to the penalties, which he might or may be subject to under any former law whatsoever, forfeit and pay one hundred dollars for every offence, which he or they may be guilty of, against the true intent and meaning of this act, or any former act for preventing, or discouraging or suppressing unlawful gaming, and shall be compelled to give security for his, or her, good behaviour in the sum of five hundred dollars or more in the discretion of the court. And if he shall thereafter be guilty of the same or like offence, it shall be deemed a forfeiture of of his recognizance, and he shall be imprisoned without bail or main-

prize until the sum, in which he may be therein bound, shall be paid, or until he shall be discharged under the several acts for the relief of insolvent debtors.

SEC. 21. *And be it further enacted:* That the general court shall have the power of revoking the licenses of tavern keepers in any case of delinquency in permitting unlawful gaming in their houses or taverns.

SEC. 22. In every case that may arise under any law for the preventing, discouraging or suppressing of gaming, the court shall interpret them as remedial, and not as penal statutes.

And be it further enacted: That the judges of the general court are hereby empowered to execute this, and all other laws, for the purpose of suppressing gaming.

The presiding judge shall constantly give this act in charge to the grand jury at the times when such grand jury shall be sworn.

The foregoing is hereby declared to be a law at this Territory, and to take effect from and after the seventh day of April next.

In testimony whereof, we, Ninian Edwards, Governor, and Jesse B. Thomas and Alexander Stuart, Judges, have hereunto signed our names, at Kaskaskia, this ninth day of March, in the year of our Lord one thousand eight hundred and ten, and of the Independence of the United States the thirty-fourth.

A true copy, attest,
WILLIAM ARUNDEL, Clerk.

NINIAN EDWARDS,
JESSE B. THOMAS,
ALEXR. STUART.

AN ACT repealing parts of certain acts.

Be it enacted by the Governor and Judges of the Illinois Territory, and it is hereby enacted by the authority of the same: That as much of the sixth section of an act, entitled, "An act regulating the admission and practice of attornies and counsellors at law," passed by the General Assembly of the Indiana Territory on the seventeenth day of September, in the year eighteen hundred and seven, as prohibits the judges of any other Territory or State from practising law in this Territory;

And also the fourth section of an act, entitled, "An act concerning the introduction of negroes and mulattoes into the Territory," passed by the said General Assembly on the seventeenth day of September, in the year eighteen hundred and seven, be, and are, hereby repealed.

The foregoing is hereby declared to be a law of the Territory, and

to take effect accordingly from the date thereof.

In testimony whereof, we, Ninian Edwards, Governor, and Jesse B. Thomas and Alexander Stuart, Judges, have hereunto set our hands, at Kaskaskia, the thirteenth day of March, in the year of our Lord eighteen hundred and ten, and of the Independence of the United States the thirty-fourth.

A true copy, attest,
WILLIAM ARUNDEL, Clerk.

NINIAN EDWARDS,
JESSE B. THOMAS,
ALEXR. STUART.

AN ACT to suppress duelling. Adopted from the Virginia Code.

WHEREAS, experience has evinced that the existing remedy for the suppression of the barbarous custom of duelling is inadequate to the purpose, and the progress and consequences of the evil have become so destructive as to require an effort on the part of the Legislature to arrest a vice, the result of ignorance and barbarism, justified neither by the precepts of morality nor by dictates of reason, for remedy whereof:

Be it enacted by the Acting Governor and Judges of the Illinois Territory, and it is hereby enacted by the authority of the same: That any person who shall hereafter wilfully and maliciously, or by previous agreement, fight a duel or single combat with any engine, instrument or weapon, the probable consequence of which might be death of either party, and in so doing shall kill his antagonist, or any other person or persons, or inflict such as that the person injured shall die thereof within three months thereafter, such offender, his aiders, abettors and counsellors being thereof duly convicted, shall be guilty of murder and suffer death by being hanged by the neck, any law, custom or usage of this Territory to the contrary notwithstanding.

And be it further enacted: That if any person whatsoever shall challenge another to fight a duel with any weapon or in any manner whatsoever, the probable issue of which may, or might, result in the death of the challenger or challenged; or if any person shall accept a challenge, or fight a duel with any weapon, or in any way whatsoever, the probable issue of which may, or might, terminate in the death of the challenger or challenged, such person shall be incapable of holding, or being elected to, any post of profit, trust or emolument, civil or military, under the government of this Territory.

And be it [further] enacted: That from and after the passing of this act, every person, who shall be appointed to any office or place,

civil or military, in this Territory, shall in addition to the oath now prescribed by law, take the following oath: "I do solemnly swear, or affirm, (as the case may be) that I have not been engaged in a duel by sending or accepting a challenge to fight a duel, or by fighting a duel, or in any other manner in violation of the act, entitled, "An act to suppress duelling" (since the passage of that act), nor will I be so concerned directly or indirectly in such duel during my continuance in office, so help me God."

And be it further enacted: That it shall be the duty of the presiding judge of the general court at each session of the court to give in charge expressly to the jury this law, and also to charge the jury to present all persons concerned in carrying, sending or accepting a challenge.

And be it further enacted: That when any judge or magistrate of this Territory has good cause to suspect any person, or persons, are about to be engaged in a duel he may issue his warrant to bring the parties before him; and if he shall think proper, to take of them a recognizance to keep the peace. He shall insert in the condition, that the party, or parties, shall not during the time for which they were bound, directly or indirectly be concerned in a duel, either with the person suspected or any other person, within the time limited by the recognizance.

And be further enacted: That if any person, or persons, shall, for the purpose of eluding the operation of the provisions of this law, leave the Territory, the person, or persons, so offending shall be deemed as guilty and be subject to the like penalties as if the offence had been committed within this Territory. If any person shall leave this Territory with the intention of giving or receiving a challenge to fight a duel, or of aiding or abetting in giving or receiving such challenge, and a duel shall actually be fought, whereby the death of any person shall happen, and the person so leaving the Territory shall remain thereout, so as to prevent his apprehension for the purpose of a trial; or if any person shall fight a duel in this Territory, or aid or abet therein, whereby any person shall be killed, and then flee into another State or Territory to avoid his trial, in either case it shall be the duty of the Executive, and they are hereby directed to adopt and pursue all legal steps, to cause any such offender to be apprehended and brought to trial in the county where the offence was committed, when the duel shall have been fought within the Territory; and, when

it shall have been fought without the Territory, then in that county where, in the opinion of the executive, the evidence against the offender can be best obtained and produced upon his trial.

And be it further enacted: That it shall be the duty of the attorney general of the Territory to give information to the executive, whenever a case shall arise, which shall render the interposition of the executive authority under this act necessary, and the deputies of the attorney general at the first court, which shall be held, in which they are to act as prosecuting attorneys, after they have accepted their appointments, shall take the following oath: "I do solemnly swear, or affirm, (as the case may be) that I will to the best of my judgment, execute the duty imposed on me by the act for suppressing duelling, so help me God."

And be it further enacted: That all words, which from their usual common construction and acceptation are considered as insults, and lead to violence and breach of the peace, shall hereafter be actionable; and no plea, exception or demurrer shall be sustained in any court within this Territory to preclude a jury from passing thereon, who are hereby declared to be the sole judges of the damage sustained: *Provided*, that nothing herein contained shall be construed to deprive the several courts of this Territory from granting new trials as heretofore.

The foregoing is hereby declared to be a law of the Territory, and to take effect accordingly from the date thereof.

In testimony whereof, we, Nathaniel Pope, Secretary, now Acting Governor, and Jesse B. Thomas and Alexander Stuart, Judges, have hereunto signed our names, at Kaskaskia, the seventh day of April, in the year of our Lord one thousand eight hundred and ten, and of the Independence of the United States the thirty-fourth.

A true copy, attest,
WILLIAM ARUNDEL, Clerk.

NAT. POPE,
J. B. THOMAS,
ALEX. STUART.

A LAW concerning advertisements.

WHEREAS, it is provided by several of the statute laws now in force in this territory, that advertisements should be inserted in some public newspaper published in the Territory for the time and in the manner therein required; and whereas, there is at this time no newspaper printed in this Territory:

Be it therefore enacted by the acting Governor and Judges of the

Illinois Territory and it is hereby enacted by the authority of the same: That in all cases, where by law it is required that advertisements should be inserted in some newspaper in the Territory, it shall and may be lawful for all and every person and persons concerned, or whose duty it shall be, to have the said advertisements inserted in some of the newspapers published in the Louisiana Territory, for the times and in the manner required by law, which shall have the same force and effect, as if inserted in a newspaper published in this Territory.

This act shall take effect from the passage thereof, and shall continue in force until a newspaper is established and published in this Territory and no longer.

In testimony whereof, we, Nathaniel Pope, Secretary, now Acting Governor, and Jesse B. Thomas and Alexander Stuart, Judges have hereunto signed our names, at Kaskaskia, the twenty-first day of May, in the year of our Lord one thousand eight hundred and ten, and of the Independence of the United States the thirty-fourth.

A true copy, attest,
WILLIAM ARUNDEL, *Clerk.*

NAT. POPE,
ALEXR. STUART,
J. B. THOMAS.

AN ACT repealing so much of the law of the regulating county levies as imposes a tax on neat cattle.

Be it enacted by the Governor and Judges of the Illinois Territory, and it is hereby enacted by the authority of the same: That so much of any law or laws as provided for laying any tax on neat cattle shall be and the same is hereby repealed.

The foregoing is hereby declared to be a law of this Territory, and to take effect from the date thereof.

In witness whereof, we Ninian Edwards, Governor and Jesse B. Thomas and Stanley Griswold, Judges, have hereunto signed our names, at Kaskaskia, the tenth day of October, in the year of our Lord, one thousand eight hundred and ten, and of the Independence of the United States the thirty-fifth.

A true copy, attest,
WILLIAM ARUNDEL, *Clerk.*

NINIAN EDWARDS,
JESSE B. THOMAS,
STANLEY GRISWOLD.

AN ACT concerning courts of common pleas.

Be it enacted by the Governor and Judges of the Illinois Territory and it is hereby enacted by the authority of the same: That

the fourth section of an act entitled, "An act concerning courts of common pleas and county courts," passed by the Governor and Judges of the Territory aforesaid on the sixteenth day of June eighteen hundred and nine, repealing the law that required the appointment of three judges to the court of common pleas, shall be, and the same is, hereby repealed.

SEC. 2. *Be it further enacted by the authority aforesaid:* That the third section of the before recited act, whereby county courts to consist of justices of the peace are established, except so far as relates to the times of holding courts shall be, and the same is, hereby repealed.

SEC. 3. *Be it [further] enacted by the authority aforesaid:* That any law, or laws, which have heretofore been enacted by the Governor and Judges aforesaid, taking from the court of common pleas any jurisdiction, except over suits and prosecution of a civil and criminal nature, shall be, and the same are, hereby repealed: *Provided, nevertheless,* that nothing herein contained shall be construed to deprive the said courts of common pleas of jurisdiction over appeals from the judgments of justices of the peace, as they are now regulated by law, or to deprive them of any powers which the county courts possessed.

SEC. 4. *Be it further enacted by the authority aforesaid:* That so much of any law, as repeals the law allowing the judges of the courts of common pleas two dollars per day for their services, shall be, and the same is, hereby repealed.

In testimony whereof, we, Ninian Edwards, Governor, and Alexander Stuart and Jesse B. Thomas, Judges, have hereunto signed our names, at Kaskaskia, this twenty-second day of January, eighteen hundred and eleven, and of the Independence of the United States the thirty-fifth.

A true copy, attest,
WILLIAM ARUNDEL, *Clerk.*

NINIAN EDWARDS,
ALEXR. STUART,
J. B. THOMAS.

AN ACT concerning the powers of the Governor of the Territory of Illinois. Adopted form the constitution of the State of Pennsylvania.

Be it enacted by the Governor and Judges of the Illinois Territory, and it is hereby enacted by the authority of the same: That the Governor of the Territory aforesaid shall have power to remit

finances and forfeitures and grant reprieves and pardons, except in cases of impeachment.

The foregoing is declared to be a law of the Territory, and to have effect as such.

In testimony whereof, we, Ninian Edwards, Governor, and Alexander Stuart and Jesse B. Thomas, Judges, have hereunto subscribed our names, at Kaskaskia, in the Territory aforesaid on the twenty-third day of January, eighteen hundred and eleven, and of the Independence of the United States the thirty-fifth.

A true copy, attest,
WILLIAM ARUNDEL, *Clerk*.

NINIAN EDWARDS,
ALEX. STUART,
J. B. THOMAS.

AN ACT *concerning occupying claimants of land. Adopted from the Kentucky code.*

Be it enacted by the Governor and Judges of the Illinois Territory, and it is hereby enacted by the authority of the same: That whereas, from the frequency of interfering claims to land and the unsettled state of the country, it often happens that titles lay a long time dormant and many persons deducing a fair title from the record, settle themselves on land supposing it to be their own, from which they may afterwards be evicted by a title paramount thereto; and it is just that the proprietor of the better title shall pay the occupying claimant of the land for all valuable improvements made thereon, and also that the occupying claimant shall satisfy the real owner of the same for all damages that may have been done to the land by the commission of waste or otherwise during the occupancy. Therefore:

SEC. 1. *Be it enacted by the authority aforesaid:* That all and every person, who may hereafter be evicted from any land, for which he can shew a plain and connected title in law or equity deduced from the record of some public office without actual notice of an adverse title in like manner derived from record, shall be exempt and free from all and every species of action, writ or prosecution for, or on account of, any rents or profits or damages, which shall have been done, accrued or incurred at any time prior to receipt of actual notice of the adverse claim by which the eviction may be effected: *Provided*, [that] such person obtained peaceable possession of the land.

SEC. 2. *And be it further enacted:* That the court, who shall pronounce and give the judgment of eviction either in law or equity, shall at the time nominate seven fit persons, any five of whom shall have

power; and it shall be their duty to go on the premises and, after viewing the same, on oath or affirmation to assess the value of all such lasting and valuable improvements, which shall have been made thereon prior to the receipt of such notice as aforesaid; and also to assess all damages the land may have sustained by the commission of any kind of waste or by the reduction of soil by cultivation or otherwise during the occupancy of the person evicted, and then subtract the same from the estimated value of the said improvements, which assessment signed and sealed by the persons making the same shall be by them lodged with the clerk of the court, wherein they were nominated, before the next ensuing term or as soon thereafter as may be convenient; and at the next court after such assessment, it shall be entered up as a judgment in favor of the person evicted and against the successful claimant of the land, by the clerk. Upon which judgment, execution shall immediately be issued by the clerk, if directed by the person evicted; unless the successful claimant shall give bond and security, to be judged of by the court, to the person evicted, and to be taken at the time of entering up such judgment, conditioned to pay the same within twelve months from the date thereof with five per cent interest thereon, provided the balance shall ultimately be in favor of such occupying claimant, according to the directions and provisions of this act; which bond shall have the force of a judgment, and at the expiration of twelve months aforesaid an execution shall be issued upon the same by the clerk of the court, in which it was taken, at the request of the party entitled thereto, on oath being made that the same is yet due. Should the balance be in favor of the successful claimant, judgment in like manner shall be entered up in his favor against the other party for the amount of the same, upon which an execution may be issued as aforesaid, unless bond and security shall be given to such claimant, which may be acted upon in the manner before directed, and to declare what law shall be between the adverse claimants under distinct titles of the kinds aforesaid after notice.

SEC. 3. *Be it further enacted by the authority aforesaid:* That the persons nominated by the court as aforesaid, when making an assessment, shall carefully distinguish between such improvements as were made on the land prior to notice, and those which were made after notice; and when making an assessment they shall also take into consideration all such necessary and lasting improvements as shall

have been made on the lands after the receipt of such notice as aforesaid, and shall ascertain the amount of the value thereof; and they shall also take into consideration and ascertain the amount of the value of the rents and profits arising from the whole of the improvements on the land from the time that notice of such adverse claim was received by the occupying claimant; and then after taking the amount of the one from the other, the balance shall be added to, or subtracted from, the amount of the value of the improvements, which shall have been made before the receipt of the notice aforesaid, as the nature of the case shall require.

SEC. 4. *Be it further enacted:* That the said commissioners shall also estimate the value of the lands in dispute exclusive of any improvements that shall have been made thereon, and make report of the amount of such valuation to the court; and if the value of the improvements shall exceed such estimated value of the land in dispute, in that case it shall, and may be, lawful for the proprietor of the better title to transfer or convey, as the nature of the case may require, his better title to the occupying claimant, and thereupon a judgment shall be entered up in favor against the occupying claimant, for such estimated value, upon which an execution may issue; unless the occupying claimant shall give bond and security, to be approved of by the court, to pay the amount of such judgment within one year after the person transferring or conveying as aforesaid, with interest from the date, which bond shall have the force of a judgment; and if not paid at the expiration of the year, an execution may issue on the manner before directed by this act: *Provided, however,* that the proprietor of the better title shall, in every such case at the time of entering up judgment in his favor, give bond and security to be approved of by the court to the occupying claimant to refund the amount of such judgment in case the land so transferred or conveyed shall ever thereafter be taken from him by any other prior or better claim.

SEC. 5. *Be it further enacted:* That the persons, nominated by the court in virtue of this act, shall be called commissioners, and shall respectively take an oath or affirmation to do equal right to the parties in controversy, and shall also have power and authority to call witnesses, and administer the necessary oaths, and to examine them for the ascertainment of any fact material in the enquiry and assessment by this act directed.

SEC. 6. *And be it further enacted:* That the said commission-

ers in making every estimate of value by virtue of this act shall state separately the result of each, and the court shall have power to make such allowance to the said commissioners in any case as shall seem just, which allowance shall be taxed and collected as costs: *Provided*, that this act shall not be extended to affect or impair the obligations of contracts or to authorise the occupying claimant to be twice paid for his improvements; and in all cases where the occupying claimant is paid for his improvements by any other person than the proprietor of the better title, such person shall have the same redress as is allowed to the occupying claimant.

SEC. 7. *And be it further enacted*: That the court shall have the same power to proceed by appointing commissioners to assess the value of the improvements and the damages by the commission of any kind [of] waste, by reduction of soil, by cultivation or otherwise during the occupancy of the person evicted in case of arbitration or by consent of the parties on motion without suit.

SEC. 8. *And be it further enacted*: That notice of any adverse claim, or title to the land, within the meaning of this act shall have been given by bringing a suit either in law or equity for the same by the one or the other parties, and may hereafter be given, by bringing a suit aforesaid or by delivering an attested copy of the entry, survey or patent from which he derives his title or claim, or leaving any such copy with the party, his wife or other free person above the age of sixteen years on the plantation: *Provided, however*, that the notice be given by the delivery of an attested copy as aforesaid shall be void, unless suit is brought within one year thereafter: *Provided* that in no case shall the proprietor of the better title be obliged to pay to the occupying claimant for improvements, made after notice, more than what is equal to the rents and profits aforesaid.

SEC. 9. *And be it further enacted*: That notice to any occupying claimant shall bind all those claiming from, by or through such occupying claimant to the extent of such claim.

SEC. 10. *And be it further enacted*: That nothing in this act shall be construed so as to prevent any court from issuing a precept to stay waste, and ruling the party to give bond and security in such manner as such court may think right.

This act shall be in force from the passage thereof.

The foregoing is hereby declared to be a law of this Territory.

In testimony whereof, we, Ninian Edwards, Governor, and Alex-

ander Stuart and Jesse B. Thomas, Judges, have hereunto signed our names, at Kaskaskia, this twenty-fourth day of January, in the year of our Lord eighteen hundred and eleven, and of the Independence of the United States the thirty-fifth.

A true copy, attest,
WILLIAM ARUNDEL, Clerk.

NINIAN EDWARDS,
ALEXR. STUART,
J. B. THOMAS.

*A LAW concerning the militia. Adopted from the militia law of South Carolina.*¹

Be it enacted by the Governor and Judges of the Illinois Territory, and it is hereby enacted by the authority of the same: That all officers shall reside within their respective commands, and on their removal therefrom their commission shall be vacated.

That all brigadiers shall have the right to appoint their respective *aids de camp*, who shall have the rank of captain, and that they also have the right to appoint their respective brigade inspectors.

That the regimental staff shall be appointed by the colonels, respectively, and be approved by the brigadiers, and that all officers to be nominated and appointed as aforesaid shall be commissioned by the Governor.

That all fines shall [be] inflicted on non-commissioned officers and privates by the judgment of a majority of the commissioned officers in the company in which the offenders are enrolled.

All other laws within the purview of this law are hereby repealed.

The foregoing is hereby declared to be a law of this Territory, and to take effect from the date thereof.

In testimony whereof, we, Ninian Edwards, Governor, and Alexander Stuart and Jesse B. Thomas, Judges, have hereunto signed our names, at Kaskaskia, the seventeenth day of June, in the year of our Lord one thousand eight hundred and eleven, and of the Independence of the United States the thirty-fifth.

NINIAN EDWARDS,
ALEXR. STUART,
J. B. THOMAS.

A LAW concerning the militia. Adopted from the Kentucky Code.

Be it enacted by the Governor and Judges of the Illinois Territory, and it is hereby enacted by the authority of the same: [That]

¹ The last four are reprinted from the *Publications of the Illinois State Hist. Lib.*, No. 2.

the Governor shall provide for raising companies of grenadiers, light infantry, cavalry, riflemen and artillery agreeable to the laws of the United States at his discretion; and when raised and officered shall be subject to the laws and rules of the said United States and of this Territory as other militia.

Be it further enacted by the authority aforesaid: That so much of any law or laws as requires that the brigadiers shall choose their brigade inspectors from the commissioned officers of the brigade, and so much of any law as requires that the colonels of regiments shall select their regimental staff from the commissioned officers of the regiment, shall be and the same is hereby repealed.

The foregoing is hereby declared to be a law of this Territory, and to take effect from the date thereof.

In testimony whereof, we, Ninian Edwards, Governor, and Alexander Stuart and Jesse B. Thomas, Judges, have hereunto signed our names, at Kaskaskia, the twenty-sixth day of June, in the year of our Lord one thousand eight hundred and eleven, and of the Independence of the United States the thirty-fifth.

NINIAN EDWARDS,
ALEXR. STUART,
J. B. THOMAS.

A LAW altering the time of holding the general court at Cahokia, in the county of St. Clair.

Be it enacted by the Governor and Judges of the Illinois Territory, and it is hereby enacted by the authority of the same: [That] whereas, from the present appearances there is great reason to apprehend that the approaching fall will be uncommonly sickly, especially at the town of Cahokia, in the county of St. Clair, and that in consequence thereof, the judges of the general court, jurors, suitors and witnesses will, in many instances, be unable to attend the court at the next term, as now directed by law to be holden in said town:

Be it therefore enacted: That the general court shall hold its next session in the town of Cahokia on the fourth Monday in the month of October next, and that all process issued since April last shall be considered as returnable to the said fourth Monday in October next.

This law shall take effect from and after the tenth day of August next.

In testimony whereof, we, Ninian Edwards, Governor, and Alexander Stuart and Jesse B. Thomas, Judges, have hereunto signed our names at Kaskaskia, the thirty-first day of July, in the year of our Lord one thousand eight hundred and eleven, and of the Independence of the United States the thirty-sixth.

NINIAN EDWARDS,
ALEXR. STUART,
J. B. THOMAS.

The foregoing contains a true copy of all the laws enacted by the Governor and Judges and filed in the office of the Secretary from March first, eighteen hundred and eleven, to the thirty-first of August following, inclusive.

Given under my hand, at Kaskaskia, the twenty-eighth day of January, eighteen hundred and twelve.

AN ACT *to repeal an act, entitled, "An act to encourage the killing of wolves."*

Be it enacted by the Governor and Judges of the Illinois Territory, and it is hereby enacted by the authority of the same: That an act passed by the Legislature of the Indiana Territory, bearing the date of the fourteenth day of September, in the year eighteen hundred and seven, entitled, "An act to encourage the killing of wolves," be and the same is hereby repealed.

This act to take effect and be in force from and after the first day of January next.

The foregoing is hereby declared to be a law of the Territory, and to take effect accordingly.

In testimony whereof, we, Ninian Edwards, Governor, and Alexander Stuart, Jesse B. Thomas and Stanley Griswold, Judges, have hereunto subscribed our names, at Kaskaskia, the ninth day of November, in the year of our Lord, eighteen hundred and eleven, and of the Independence of the United States the thirty-sixth.

NINIAN EDWARDS.
ALEXR. STUART,
J. B. THOMAS,
STANLEY GRISWOLD.

A true copy of all the laws passed from September first, eighteen hundred and eleven to the twenty-ninth of February, eighteen hundred twelve.

NAT. POPE, *Secretary.*

L A W S
PASSED
BY
THE LEGISLATIVE COUNCIL
AND
HOUSE OF REPRESENTATIVES
OF
ILLINOIS TERRITORY
AT
THEIR FIRST SESSION
HELD
AT KASKASKIA
IN 1812

FIRST PRINTED BY
MATTHEW DUNCAN
RUSSELLVILLE, KY.
1813

(From the second printing made from the original records,
by The Boston Book Company, 1920.)

A LIST OF LAWS

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LAWS OF ILLINOIS TERRITORY

Enacted in 1812.

AN ACT declaring what laws are in force in the Illinois Territory.

SEC. 1. Be it enacted by the Legislative Council and House of Representatives and it is hereby enacted by the authority of the same. That all the laws passed by the Legislature of the Indiana Territory which were in force on the first day of March in the year one thousand eight hundred and nine in that Territory, that are of a general nature and not local to Indiana Territory and which are unrepealed by the laws passed by the Governor and Judges of the Illinois Territory are hereby declared to be in full force and effect in this Territory, and shall so remain until altered or repealed by the Legislature of this Territory.

SEC. 2. Be it further enacted. That all the laws passed by the Governor and Judges of the Illinois Territory which remain unrepealed by them are hereby declared to be in full force and effect within this Territory, and so to remain until altered or repealed by the Legislature. This act to commence and be in force from and after the passage thereof

GEO FISHER

Speaker of the House of Representatives.

WILLIAM BIGGS

President of the Legislative Council pro, tem

Approved Dec. 13. 1812

NINIAN EDWARDS

AN ACT for the Relief of the Sheriffs of Randolph & St. Clair Counties

Whereas the Sheriffs of Randolph and StClair Counties were unable to finish their business in the Counties of Gallatin, Johnstone & Madison in consequence of their being now separated from the Counties of Randolph and StClair and in consequence of the inauspicious state of our affairs in relation to the Savages which called them as well as a great number of the People to the defence of our Frontiers—And whereas by the division of the Counties of Randolph and StClair the said Sheriffs are not by Law authorized to make their

Collections in those Counties:— Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory & it is hereby enacted by the authority of the same—That the said Sheriffs of Randolph & StClair Counties shall have a right to finish their business and shall be allowed the further time of Six months to make their Collections & settle up their accounts in the same manner precisely as if no division of the Counties of Randolph and StClair had taken place.

This act to be in force from the passage thereof.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved Dec 17th 1812

NINIAN EDWARDS

AN ACT concerning proceedings in Civil Cases.

SEC. 1. Be it enacted by the Legislative Council and House of Representatives and it is hereby enacted by the authority of the same.—That in all cases which may hereafter be depending before any Court of Law in this Territory if the plaintiff recovers a verdict for any Sum however small. He shall be entitled to full Costs any Law to the contrary notwithstanding.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved Dec 19. 1812

NINIAN EDWARDS

AN ACT vesting the Judges of the General Court with Chancery Powers.

SEC. 1. Be it enacted by the Legislative Council & House of Representatives of the Illinois Territory & it is hereby enacted by the authority of the same: That the Judges of the General Court of the said Territory shall be and they are hereby authorized to exercise all the Powers & authority usually vested in & exercised by a Court of Chancery which said Court shall be called & styled The Court of Chancery

SEC. 2. The said Judges of any two of them shall annually hold two stated terms of the said Court of Chancery at the seat of Government of the Territory commencing the Day (if it should not be on a Sunday) after the General Court sitting as a Court of Law shall have gone through their business.

SEC. 3. In all Suits in the said Court of Chancery the Rules & Methods which regulate the practice of the High Court of Chancery in England shall as far as the said Court may deem the same applicable, be observ'd except as hereinafter mentioned.

SEC. 4. If the Court shall not sit or be opened at any of the said Terms whereon the same ought to be held the Writs & process then returnable & the Bills Suits pleadings and proceedings before the said Court shall be continued of course untill the next Term & from Term to Term untill the Court shall sit.

SEC. 5. The Court in Term or any of the said Judges in vacation shall be authorised to grant Writs of ne exeat, Injunction, Certiorari or other process usually granted by a Court of Equity.

SEC. 6. If the Complainant resides out of the Territory he shall before the issuing of Process to appear cause a bond to be executed by at least one sufficient Person being a Freeholder & resident in the Territory to the Defendant in the penal Sum of Two Hundred Dollars conditioned to prosecute the suit with effect & to pay Costs if the Defendant should be intitled thereunto & to have the same filed with the Clerk in default whereof the said Complanants said Bill shall be dismiss'd with Costs.

SEC. 7. Any Complainant residing within the Territory shall at the discretion of the Court give security in the manner & form as is required in the case of non-residents.

SEC. 8. Every Subpoena, process of sequestration, Writ of Execution or other writ or process shall be issued by the Clerk at the instance of the party and signed and sealed by him.

SEC. 9. Rules to plead answer reply rejoin or other proceedings when necessary shall be given in open Court and entered in a Book kept for that purpose for the information of all parties attorneys or counsellors therein concern'd.

SEC. 10. No subpoena in Chancery shall issue untill the Bill is filed with the Clerk whose duty it shall be to copy the same and deliver the copy to the person applying for the subpoena which copy shall be delivered to the Defendant if in the Territory by the officer or

person serving the subpoena which service & delivery shall be endorsed on the back thereof & if there be more than one Defendant the copy shall be delivered to the one first named in the subpoena if he be resident within this Territory, if not the next one named in the subpoena that is a resident.

SEC. 11. When any Defendant if but one, or Defendants, if more than one, reside out of the Territory or cannot be found to be served with process of subpoena or abscond to avoid being served therewith Public notice signed by the Clerk shall be given to the Defendant or Defendants in any Newspaper printed in the Territory as the Court shall direct & if there should be no newspaper printed therein then in such Newspaper as the court shall direct either in the State of Kentucky or in the Missouri or Indiana Territories that unless he or they appear & file his or their answer by a day given him or them by the Court the Bill shall be taken pro confesso & where a bill is amended a Copy of the amendatory bill shall in like manner be delivered to the Defendant or Defendants.

SEC. 12. In suits in Chancery the Complainant may take depositions in one month after filing his bill before any Judge or Justice of the peace & the Defendant may do the like as soon as he has filed his answer which may be done without a Dedimus unless the Witnesses live without the Territory provided that reasonable notice be given of the time & place of taking such depositions which reasonable notice shall in all cases be ten days & over & above these ten days one day for every twenty miles traveled from the place of holding the Court to where the Witness or Witnesses are to be sworn & examined.

SEC. 13. If the Defendant does not file his answer in the time prescribed by the rules of the Court having also been served with process of Subpoena with a copy of the bill or notice given as required by this act the Complainant shall proceed on to hearing as if the answer had been filed & the cause at issue: Provided however that the Court for good cause shewn may allow the answer to be filed & grant a further day for such hearing.

SEC. 14. Any Defendant may swear to his answer before any Judge of this or the General Court or any Justice of the Peace and if the Defendant resides out of the Territory he may swear to his answer before any Justice of the peace of a County, City or Town incorporate the common seal of any Court of Record of such County,

City or Town corporate being thereunto annexed.

SEC. 15. The complainant having obtain'd decree & the Defendant not having complied therewith by the time appointed it shall be Lawful for the said Court to issue a writ of fieri facias against the goods & chattels, Lands, Tenements & Hereditaments of the Defendant upon which sufficient property shall be taken & sold to satisfy the said demand with costs or to issue a capias adsatisfaciendum against the Defendant upon writs of fieri facias & capias ad satisfaciendum there shall be the same proceedings as at Law or to cause by injunction the possession of effects and Estate demanded by the bill & whereof the possession or sale is decreed to be delivered to the complainant or otherwise according to such decree & as the nature of the case may require.

SEC. 16. When a decree of a Court of Chancery shall be made for a conveyance, release or acquittance and the party against whom the decree shall pass shall not comply therewith by the time appointed then such decree shall be taken & considered in all Courts of Law & Equity to have the same operation & effect & be as available as if the conveyance release or acquittance had been executed conformably to such decree.

SEC. 17. A decree of the Court of Chancery shall from the time of its being signed have the force, operation & effect of a Judgement at Law in the General Court in this Territory from the time of the actual entry of such Judgement.

SEC. 18. A writ of fieri facias shall bind the goods of the person against whom it is issued from the time it was delivered to the Sheriff or officer to be executed as at Law.

SEC. 19. That a Clerk to the aforesaid Court of Chancery shall be appointed by the acting Governor of the Territory and shall enter into Bond with security to be approved of by said Governor in the Penalty of One Thousand Dollars condition'd for the faithful performance of such duties as are hereby required or hereafter may be required of him which Bond shall be filed in the office of the Secretary of the Territory.

SEC. 20. No injunction shall be granted to staying proceedings at Law unless the party praying the injunction have at least by one witness proved that the opposite party (if living in the Territory if not his agent or attorney of record had at least ten & not more than fifteen Days notice of the time & place of applying for such

injunction from the time of which notice given all proceedings at Law shall be stayed untill the Court or Judges decision shall be made whether an injunction shall or shall not be granted but if the Complainant shall not make application for such injunction on the Day specified in such notice then the plaintiff at Law may proceed as if none had been given nor shall any injunction be granted to stay any Judgment at Law for a greater Sum than that the Complainant shall shew himself equitably not bound to pay & so much as shall be sufficient to cover the Costs and every injunction when granted shall operate as a release to all errors in the proceedings at Law that are prayed to be enjoin'd. Nor shall any injunction be granted unless the Complainant shall have previously executed a Bond to the Defendant with sufficient surety to be approv'd of by the Court or Judges granting the injunction in double the sum prayed to be injoin'd condition'd for the payment of all monies and Costs due or to be due to the plaintiff in the action at Law and also all such Costs and damages as shall be awarded against him or her in case the injunction shall be dissolv'd. If the injunction shall be dissolv'd in the whole or in part of the Complainant shall pay Six pCent exclusive of Legal interest beside Costs and the Clerk shall issue an Execution for the same when he issues an Execution upon such Judgement—on the dissolution of an injunction judgement shall be given by the Court against sureties as well as against the Complainant in the injunction Bond. Provided however that no injunction to stay proceedings at Law shall be granted after thirty Days next succeeding the end of the Term at which the Judgement sought to be injoin'd was rendered.

SEC. 21. Whenever affidavits are taken either to support or dissolve an injunction the party taking the same shall give the adverse party reasonable notice of the time & place of taking the same & the Clerk shall issue to either of the parties Subpoenas to procure the attendance of witnesses at the time & place appointed & such affidavits taken as aforesaid shall be read on the final hearing of the Cause in which they may be taken under the same restrictions as Depositions taken according to Law—

SEC. 22. No notice shall be necessary in any Case where application is made for an injunction in Term time nor in vacations where the Title or Bonds for Land shall come in question.

SEC. 23. Writs of Ne Exeat shall not be granted but upon Bill

filed and affidavit to the allegations which being produced to the Court in Term time or the Judge in vacation he or they may grant or refuse such writ as to him or them shall seem meet & if granted he or they shall endorse thereon in what penalty Bond & security be required of the Defendant.

SEC. 24. No writ of Ne Exeat shall issue untill the Complainant shall give Bond and Security in the Clerks Office to be approved by the Court or Judge and in such penalty as he or they shall adjudge necessary to be endors'd on the Bill and in Case any person stayed by such writ of Ne exeat shall think himself or themselves aggrieved he or they may bring Suit on such Bond and if on the Trial it shall appear that the Writ of Ne Exeat was paryed without a just cause the Person injured shall recover Damages.

SEC. 25. If the Defendant or Defendants to the Bill shall go out of the Territory but shall return, before a personal appearance shall be necessary to perform any order or Decree of the Court such his or her temporary departure shall not be considered as a breach of the Condition of the Bond.

SEC. 26. Whenever the Defendant to the Bill shall give security that he will not depart the Territory the security shall have leave at any time before the Bond shall be forfeited to secure his principal in the same manner that special Bail may surrender their principal and obtain the same discharge.

SEC. 27. If any Bill shall be brought touching any matter or thing real or personal which shall not be of the value of Fifty Dollars the same shall be dismiss'd with Costs. And be it further enacted that all Laws and parts of Laws coming within the purview of this Act be and the same are hereby repeal'd. This Act shall be in force from and after the first day of January next

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved Dec 19, 1812

NINIAN EDWARDS.

AN ACT regulating the Courts of Common Pleas and fixing the times of holding Terms in the several Counties, etc.

SEC. 1. Be it enacted by the Legislative Council and House of Representatives and it is hereby enacted by the authority of the

same—That the Courts of Common Pleas in the several counties in this Territory; shall hereafter possess and exercise the same Jurisdiction and Powers in the respective Counties, that were possess'd and exercis'd by the said Courts by virtue of the Laws of the Indiana Territory on the first day of March in the year One Thousand Eight hundred and nine any Law or parts of Law to the contrary notwithstanding.

SEC. 2. Be it further enacted that the Judges of the Courts of Common Pleas shall each receive for every Day they attend at their several Terms the Sum of Two Dollars to be paid out of the respective County Levies.

SEC. 3. Be it further enacted that the Terms at which suits of a Civil and Criminal nature shall be transacted as directed by Law shall commence at the following Periods in the several Counties towit: In the County of Madison on the first Mondays of February, June and October. In the County of StClair on the second Mondays of February, June and October. In the County of Randolph on the fourth Mondays of February, June and October. In the County of Johnson on the second Mondays of March, July and November. In the County of Gallatin on the fourth Mondays of March, July and November yearly & every year.

SEC. 4. Be it further enacted that the three other Terms of the said Courts shall be holden in the several Counties at the following Periods towit: In the County of Madison on the first Mondays of April, August and December—In the County of StClair on the second Mondays of April, August and December. In the County of Randolph on the fourth Mondays of April, August and December. In the County of Johnstone on the second Mondays of May, September and January. In the County of Gallatin on the fourth Mondays of May, September and January yearly and every year.

SEC. 5. Be it further enacted that all process and proceedings before the Courts of Common Pleas in the Counties of Randolph and StClair shall be and the same are hereby continued & made cognizable at the first Terms to be held therein under this Act in the same manner as if this act had not pass'd.

SEC. 6. Be it further enacted that all appeals from the Judgment of Justices of the Peace shall hereafter be return'd to and tried in the Courts of Common Pleas in the respective Counties under the same rules and regulations as are now provided by Law. All acts

and parts of Acts repugnant to this act shall be & the same are hereby repealed. This act to commence and be in force from and after the passage thereof.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved Dec 19. 1812

NINIAN EDWARDS

AN ACT for Levying and collecting a Tax on Land.

SEC. 1. Be it enacted by the Legislative Council and House of Representatives and it is hereby enacted by the authority of the same.

That for the purpose of raising a Tax upon Land it shall be divided into three classes.

The Mississippi and Ohio Bottoms shall be considered first rate. All other Located Lands second rate and all claims to Land that have been confirm'd by proper authority shall untill they are Located be consider'd as third rate but as soon as they may be Located they shall be consider'd as belonging to the second class unless they be Located in the Bottoms aforesaid but if Located in said Bottoms they shall be consider'd first rate.

SEC. 2. Be it further enacted by the authority aforesaid that each and every person claiming Land by Deed, Entry, Bond for conveyance, & confirmed by the proper Authority whether residents or non-residents shall enter the same for Taxation in the manner hereinafter provided and within the time specified and if any Person or Perosns shall fail to do so he, she or they shall forfeit Five Dollars for every hundred acres of Land one half of which shall go to any Person suing for the same and the other half for the use of the Territory.

SEC. 3. Be it further enacted by the authority aforesaid—That the Territory shall have a lien upon all and every Tract of Land or claim thereto for the Taxes hereafter imposed which lien shall not be affected by any transfer whatever and all sales and other proceedings hereinafter directed shall be deem'd good and valid in whose name soever the said Land or claim thereto shall be entered or sold unless he she or they contesting the validity thereof shall shew that the Tax had actually been paid thereon which in all cases shall be the first thing required of any one attempting to set aside any sale under this act.

SEC. 4. Be it enacted by the authority aforesaid that the following are hereby declar'd to be the Taxes requir'd to be collected under this act—For first rate Land at the rate of one hundred Cents Per hundred Acres; For second rate Land at the rate of Seventy five Cents Per hundred Acres; For third rate Land at the rate of Thirty seven and one half Cents Per hundred Acres.

SEC. 5. Be it further enacted by the authority aforesaid that those Persons hereinafter requir'd to List their Lands for Taxation shall specify as far as he, she or they can, each separate Tract, the Class it belongs to, the Name of the Original Claimant, to whom confirm'd, to whom patented; in what County and on what Water Course it lies.

SEC. 6. Be it further enacted by the authority aforesaid that all Non-residents shall enter their Lands with the Auditor of Public Accounts at his office in the Town of Kaskaskia on or before the first Day of August next and if any such non-resident or non-residents shall fail to pay the Taxes impos'd by this Law on or before the first of October the Auditor shall transmit a List of such Delinquents and the Lists of the Lands entered by them or their agents to the Sheriff of Randolph County as soon as may be whereupon the said Sheriff shall advertise the said Lands as listed for sale in some Newspaper most convenient to Kaskaskia as many as five successive weeks giving notice of the day of sale, shall accordingly sell the whole or so much of each Tract as will pay the Tax his Fee and the cost of advertising which sale shall be at the Door of the House in which Court may be usually held for the County of Randolph.

SEC. 7. Be it further enacted by the authority aforesaid, that it shall be the duty of the Commissioner of each County in this Territory to advertise in their respective Counties at the usual places of holding Courts for the same and in each Township if there be any that he will on a certain Day not less than Twenty Days thereafter attend at some place in each Township if any there be otherwise at some place that he may suppose convenient for the purpose of receiving from the Inhabitants of his County their Lists of Lands according to this Law and such persons are hereby requir'd to attend at such places as said Commissioner may appoint as aforesaid—Provided however that any person who does not attend shall have a right at any time within Ten Days thereafter to tender his her or their List according to Law to said Commissioner. In failure of any person

to List his her or their Land the Commissioner shall proceed to List such person or persons Lands agreeably to the best information he can get. Any person or persons giving in a List of their Lands as aforesaid shall swear that said List contains a true and correct account of his, her or their Lands to the best of his her or their knowledge. And if any Fraud shall be practis'd in said List or Lists the person or persons guilty thereof shall forfeit to the Territory the whole interest in the Land about which such fraud may be practis'd.

SEC. 8. Be it further enacted that said Commissioner shall finish taking in the Lists aforesaid by the first Day of May in each and every year hereafter and within twenty Days thereafter shall return the same to the Clerk of the Court of Common Pleas for his County who shall make out two fair Copies of the same one of which he shall deliver to the Sheriff and the other he shall transmit to the Auditor of Public Accounts within Twenty Days retaining the Original in his office which original or the Copies thereof shall be admitted as Testimony in any Court within this Territory.

SEC. 9. Be it further enacted that the Auditor shall charge each Sheriff with the Taxes due according to their respective Lists.

SEC. 10. Be it further enacted that each Sheriff shall have power and it shall be his duty to demand of every Inhabitant of his County the amount of the Tax due by him, her or them for their Lands either personally or by leaving a notice at their usual or last place of residence on or before the first day of June next yearly and every year and on failure of any person to pay the same the Sheriff shall proceed to sell the Land or so much thereof as will pay the Tax and the Costs due on it at the Door of the House in which Court may be usually held in his County having given at least Forty days notice thereof by advertising at the door of the house aforesaid and three times successively in some Newspaper most convenient to the place of sale. Provided however that it shall be the duty of the Sheriff to receive any arrearages of Taxes with the Costs that have accrued thereon for advertising if the person tendering the same will pay him also Five Cents on each Tract for his own use: And Provided also That if the owner of any Tract or Tracts of Land for which the said Tax shall be in arrears or any person for him shall on the day on which the said Land shall be advertis'd for sale as above mentioned tender and deliver to the Sheriff to be sold on that Day by him at the place of sale as above mention'd Goods and Chattels sufficient to make the said

Tax and Costs so in arrear then the Sheriff shall not sell the said Land or any part thereof but shall make and Levy the said Tax in arrear by a public Sale of such Goods and Chattels rendering the overplus if any to the owner of such Land or such Person for him.

SEC. 11. Be it further enacted by the authority aforesaid that if any Tract of Land either of Residents or Non-Residents will not when expos'd to sale as aforesaid sell for the Taxes and Costs due thereon it shall be struck off to the Territory which shall be considered as the purchaser thereof.

SEC. 12. Be it further enacted that in all sales of Non-residents Lands the Sheriff who sells the same shall return a List of the Sales specefyng the quantity of each Traet that has been sold, the price it sold for and the purchasers name to whom it was sold. In all sales of the Lands of Residents the Sheriffs of each county respectively shall return a similar List to the Clerk of the Court of Common Pleas in his County both of which Lists shall be carefully preserv'd and it shall moreover be the duty of said Sheriff to give to each purchaser a certificate of the sale to him which shall vest the Title in him completely and perfectly unless the Land should be redeem'd in the manner hereinafter pointed out.

SEC. 13. Be it further enacted that if any Sheriff in Selling said Land should happen to charge too much Tax and Costs thereon it shall not vitiate the sale thereof but the purchaser shall relinquish so much of the Lands as will bear a proportion to the Sum overcharg'd rating the value of the whole Land purchased by the price it sold for.

SEC. 14. Be it further enacted that the Sheriffs of each County respectively shall on or before the first day of November in each Year pay to the Public Treasurer the whole amount of the Taxes collected by them on Land which shall go to defray all Territorial Expenses and the said Sheriffs shall settle with the auditor for all Delinquencies & for all Land which could not sell who is authorised to give them credit for the Same.

SEC. 15. Be it further enacted that if any Sheriff shall charge more than his Legal Fees for the collection of the Tax aforesaid He shall be subject to a fine not exceeding Three hundred Dollars—That for taking in a List of Lands as aforesaid each Commissioner shall be allow'd by the Court of Common Pleas Two Dollars Per Day for the Time necessarily spent therein and the Sheriff for Collecting

the Taxes aforesaid Seven and an half Per Cent which shall be allowed by the Auditor.

SEC. 16. Be it further enacted that all residents and non residents shall be allowed Two Years to redeem their Land. The residents by paying the price it sold for with one hundred Per Cent thereon to the Clerk of the Court of Common Pleas in the respective Counties, the non-residents by paying at the same rate to the Auditor which money the said Clerk and Auditor shall pay to the respective Purchasers, their Agents or Attorneys, whenever thereto required, and of the receipts of which they shall keep a record in their respective offices which shall at all times be evidence sufficient to vacate the sales as aforesaid.

SEC. 17. Be it further enacted that each Clerk shall be allow'd for the duties enjoin'd on him by this Act the Sum of Ten Dollars.

SEC. 18. Be it further enacted that the Auditor shall cause to be publish'd in some Newspaper for three weeks successively such parts of this Act as relates to Listing Land and the Tax impos'd thereon and the time such Tax will become due.

SEC. 19. Be it further enacted that each Sheriff shall enter into Bond to the Governor of the Territory with securities to be approv'd by the Court of Common Pleas in their respective Counties in the Sum of Two Thousand dollars condition'd for the faithful discharge of the duties enjoin'd on him by this Act

SEC. 20. Be it further enacted that an Auditor and Treasurer shall be appointed whose duty shall be the same as those requir'd by the Laws of Indiana Territory as they stood on the first Day of March 1809 and who shall keep their respective offices at the Seat of Government.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved Dec 23. 1812

NINIAN EDWARDS

AN ACT for the relief of Benjamin Stephenson.

Whereas it has been represented to the General Assembly that Benjamin Stephenson Esquire has perform'd the arduous and important duties of Brigade Inspector of the Militia of the Territory from the Month of June Eighteen hundred and Eleven up to the

present time and thereby necessarily incurr'd considerable expence: And whereas it is thought unjust that the said expences should become a private burden but that the same being necessary should be remunerated to the said Stephenson, Therefore:

SEC. 1. Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory and it is hereby enacted by the authority of the same—That it shall and may be Lawful for the Territorial Treasurer to pay to the said Benjamin Stephenson out of any Money in the Territorial Treasury not otherwise appropriated Forty Two Dollars as a full compensation for his services and a remuneration for expences incurr'd by him as Brigade Inspector up to the first day of January next. This Act shall take effect and be in force from and after the passage thereof.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved Dec 23. 1812

NINIAN EDWARDS

AN ACT *to amend an act entitled an act Regulating Grist Mills and Millers and for other Purposes.*

SEC. 1. Be it Enacted by the Legislative Council and House of Representatives of the Illinois Territory and it is hereby enacted by the Authority of the same.

That any Person or Persons who shall hereafter build any Mill or Dam or any River, Creek, run or Spring within this Territory (without first complying with the ninth Section of the Act to which this is an amendment) and thereby work an injury to any other Person or Persons shall be subject to the fine of Two hundred Dollars for every such offence to be recovered before any Court of Record in this Territory by any Person who shall or may be injured and will sue for the same, and all Mills so built without complying with the Act aforesaid shall be deemed nuisances and dealt with as such. This Act to commence and be in force from and after the Passage thereof.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved Dec 25. 1812

NINIAN EDWARDS

AN ACT *concerning Frauds.*

SEC. 1. Be it enacted by the Legislative Council and House of Representatives and it is hereby enacted by the authority aforesaid. That an Action on the Case may be brought for any Fraud whatsoever that the Plaintiff in any such suit at the time of filing his or her declaration may file written interrogatories which it shall be the Duty of the Defendant to answer in writing which shall be filed at the time that He or She files his or her Plea.

SEC. 2. Be it further enacted by the authority aforesaid that the Defendant in all cases wherein he may suggest Fraud in the demand of the Plaintiff shall have a right to file written interrogatories which the Plaintiff shall answer in writing and file at the time he may be required to file his replication or one month after issue Joined if no replication should be necessary.

SEC. 3. Be it further enacted that every answer shall be full and specific to all and every interrogatory that may be exhibited; failing to answer, or answering evasively shall be considered as an acknowledgment of the Fact required to be answered and also a contempt to the Court; every Person answering interrogatories exhibited shall swear that his, her or their answer contains the Truth the whole Truth and nothing but the Truth to the best of his, her or their knowledge and if he, she or they shall swear falsely therein he, she or they so offending shall be deem'd guilty of Perjury.

SEC. 4. Be it further enacted by the authority aforesaid—That all interrogatories and answers required to be filed by this Act shall be laid before the Jury at the tryal who shall be Judges of the Truth of the allegation they contain or the Facts they suggest and if they find from the answer of the Plaintiff in any Case that Fraud has taken place they may make such deductions from his Demand as they may think right and in all cases when it shall appear that fraud has been practised on the Plaintiff they shall allow him such damages as they may think just and right.

SEC. 5. Be it further Enacted by the authority aforesaid—That this Act shall be considered a remedial one to all intents & purposes whatever and that it shall be and continue to be in force from and after the passage thereof.

GEO FISHER

Speaker of the House of Representatives

Approved Dec 25. 1812

PIERRE MENARD

NINIAN EDWARDS

president of the Council

AN ACT concerning Jurors.

Be it Enacted by the Legislative Council and House of Representatives and it is hereby enacted by the authority of the same— That Housekeepers shall hereafter be deem'd qualified (there being no other just exception to them) to serve on any Jury whatever. Any Law to the contrary notwithstanding. This Act to be and remain in force from and after the passage thereof.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved Dec 25. 1812

NINIAN EDWARDS

AN ACT to fix the Places of holding Courts in the several Counties.

SEC. 1. Be it enacted by the Legislative Council and House of Representatives and it is hereby enacted by the Authority of the same.

That the Courts directed to be held by Law in the County of Randolph shall hereafter be held in the Town of Kaskaskia and the Courts directed by Law to be held in the County of Gallatin shall be held in Shawano Town.

SEC. 2. Be it further enacted that the place of holding Courts in the Counties of Madison, StClair and Johnson shall be held at the following places in the said Counties untill the Judges of the respective Courts of Common Pleas in those Counties shall provide proper accommodations at the places to be fix'd upon by the Commissioners in the respective Counties as is hereinafter provided to-wit: In the County of Madison at the House of Thomas Kirkpatrick, In the County of StClair at the Court House in Cahokia, in the County of Johnson at the House of John Bradshaw.

SEC. 3. Be it further enacted that for the purpose of fixing the permanent Seat of Justice in the Counties of Madison StClair and Johnson the following Persons are hereby appointed Commissioners in the said Counties respectively to-wit: In Madison, Paul Beck, Doctor Cadwell, Alexander Waddle, George Moor, James Rentfrow, John Kirkpatrick and Ephraim Wood. In the County of StClair, James Garritson, Nathan Chambers, Samuel Kenny, Nicholas Jarrott and William Scott, Senior. In the County of Johnson, Hamlet Ferguson, Nathaniel Green and Owen Evans. which said Commissioners or a

majority of them shall meet on the first Monday in February next at the several places mentioned in the preceeding Section and having so met they shall then proceed to designate in their respective Counties a convenient place for fixing a County Seat, for the Erection or procurement of convenient Buildings for the use of the County taking into view the situation of the Settlements, the Geography of the County, the convenience of the People and the Eligibility of the place, except Johnson the centre of which (or as near as possible) the said Commissioners shall be bound to find and shall in no wise extent more than Three Miles from said Centre for situation; and for the County of StClair as near the Centre as may be convenient to the population of the Inhabitants thereof, which place so fix'd & determined upon the said Commissioners shall certify under their hands and seals and return the same to the next Court of Common Pleas in their respective Counties which said Courts shall cause an Entry thereof to be made on their Records and it shall be the Duty of the Courts of Common Pleas in the said Counties as early as practicable after the place so designated shall be fix'd upon to cause suitable Buildings to be provided thereat and to cause a purchase of such a quantity of Land to be made for the use of the County and to Erect a Court House and Jail and to make other improvements thereon as they may deem expedient from time to time. This Act to be in force from and after the passage thereof.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved Dec. 25, 1812

NINIAN EDWARDS

*AN ACT authorising the appointment of County Commissioners
& for other Purposes.*

SEC. 1. Be it Enacted by the Legislative Council and House of Representatives and it is hereby enacted by the authority of the same. That the Courts of Common Pleas of the several Counties in this Territory shall within fifteen days after the first day of January next and within fifteen days yearly and every year thereafter or at any special Court by them to be appointed for that purpose which they are hereby authorised at any time to hold shall appoint a Commissioner for the purpose hereafter mention'd each of whom shall be-

SEC. 3. And be it further Enacted that it shall be the duty of the auditor & he is hereby authorised and empowered to apply for and procure from the proper offices an abstract of all entries Locations and all confirm'd Lands by Legal authority held by individuals and purchased from the United States of all Lands in the several Counties in this Territory noting where & on what Creeks, water courses &c. such Entries Locations confirmations & purchases have been made with the names of Persons for whom entered Located & confirm'd & by whom purchased from the United States and it shall be the duty of the auditor to transmit the said abstracts of Entries Locations & confirmations of Land to the Clerks of the Respective Counties by the first day of May next yearly and every year which Clerks shall deliver the said abstracts to the respective Commissioners as soon as appointed which Commissioners shall again return such abstracts to the Clerks respectively after said Commissioners have finished the Business enjoin'd by this Law.

SEC. 4. Be it further enacted that so much of the several Laws as makes it the duty of the Sheriff in the respective Counties to take in a List of Taxable property in each County annually shall be and the same is hereby repealed.

SEC. 5. And be it further enacted that the Commissioners authorised to be appointed by this Act to take in the Lists of Lands in their respective Counties shall also take in a List of the Taxable property in their Counties in the same manner and at the same time and shall exercise the same Powers as heretofore directed and vested in the Sheriffs of the several Counties by Law. That said Commissioners shall be allow'd Two dollars Per Day to be paid out of the County Levy for the services last mentioned but they shall in no instance charge the Territory and the County for the same days service. That the Public auditor shall on failure of Non-residents to list their Lands, List them from the best information he can get whish List shall be proceeded on as if it has been made by Non-residents themselves. That whenever Lands are Listed in one County which lie in another they shall be sold and all such proceedings be had thereon as if they lay within said County in which they may be Listed. That in no instance shall this Law or that to which it is a supplement be so construed as to oblige one Person holding a Bond for conveyance and another holding the Legal Title to pay the Tax for the same Tract of Land but payment by one shall be sufficient

and the person holding such Bond for Conveyance shall pay said Tax.

That in all Cases the Treasurer shall pay off County Claims according to Seniority, to ascertain which it shall be the duty of the Clerks to furnish him with a List of the Claims and the times when allow'd which shall be a rule to all Treasurers.

That for any failure to execute any Duty enjoin'd by this Act on all and every Commissioner he or they so offending shall be subject to a fine of Three hundred Dollars and no Commissioner shall without incurring such Penalty resign his office till after he has perform'd the services required of him for the year in which he shall be appointed.

Each Commissioner shall previous to entering on the Duties of his office give Bond with security to be approved by the Court of Common Pleas in the Penalty of One Thousand Dollars to the Governor of the Territory condition'd for the faithful discharge of his Duty which Bond shall be filed in the Clerks Office of said Courts.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved Dec 25. 1812

NINIAN EDWARDS

AN ACT regulating Elections.

SEC. 1. Be it enacted by the Legislative Council and House of Representatives and it is hereby enacted by the authority of the same. That the next General Election for representatives to serve in the General Assembly shall commence on the first Thursday of September One Thousand Eight hundred and fourteen to be held biennially thereafter and that the Election for Members to serve in the Legislative Council shall commence on the first Thursday of September One Thousand Eight hundred and Sixteen and be held quadriennially thereafter at which respective times all qualified Voters shall have the right to Vote for representatives to serve in the General Assembly and Members of the Legislative Council consistently herewith—Provided that all votes shall be by ballot which shall be put into a Box to be prepared for that purpose when they shall remain unopened untill the close of each days Election and then they shall all be fairly counted out by the Sheriff and Judges.

SEC. 2. Be it further Enacted that all Elections for a Delegate to Congress shall be by Ballot and shall be conducted as all other Elections.

SEC. 3. Be it further Enacted that when any writ of any occasional Election shall be issued by the Governor in case of the Death or removal from Office of any representative or Member of the Legislative Council or Delegate for Congress the same shall be directed to the Sheriff of such County respectively for which such Representative or Member of the Legislative Council or Delegate for Congress who is Dead or removed from Office shall have been Elected and the Sheriff on receiving the Writ shall forthwith give due and Public Notice throughout the County Ten Days before holding such Election and the same shall be holden within Twenty Days after the writ of Election is received by the Sheriff and conducted in the manner aforesaid.

SEC. 4. Be it enacted by the authority aforesaid That in all other respects all Elections shall be govern'd by the Law of Indiana Territory entitled "a Law regulating Elections" approved the 17th day of September One Thousand Eight hundred and Seven.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved Dec 25. 1812

NINIAN EDWARDS

AN ACT to amend an Act entitled "An Act to establish and regulate Ferries."

Whereas the establishment of a plurality of ferries in the immediate neighborhood of each other across wide and turbulent streams is subversive of the objects contemplated by the act to which this is an amendment. At no one point on either of those streams the Ohio and Mississippi is the crossing so frequent as to warrant more than one ferry nor could the expense incurred to the establishment and maintenance of two be met and sustained for any length of time where this competition is permitted without making considerable sacrifice, hence ferries would be rendered unprofitable and the crafts and force necessary for the speedy and safe conveyance of property and persons could not be provided and kept up. The most wealthy

might indeed make the sacrifice for a time with a certain prospect of putting down all competitors who might in fact be entitled to more indulgence than he who from speculative motives might apply for an obtain license adjoining to an established ferry with a view of monopoly and oppression for remedy whereof:

SEC. 1. Be it enacted by the Legislative Council and House of Representatives and it is hereby enacted by the authority of the same, That from and after the passage of this act no ferry shall be established by the court of common pleas in any County in this territory, across the Ohio and Mississippi rivers within less than two miles of an established ferry. Provided nevertheless that nothing in this act shall be so construed as to prevent the heirs of James Piggott decd, from reestablishing their former ferry on the Mississippi river opposite St. Louis and also that all ferries established by the laws of Indiana are hereby declared established ferries in the Illinois Territory unless repealed.

SEC. 2. And be it further enacted, That so much of the act to which this is a supplement as comes within the purview of this act shall be and the same is hereby repealed.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

President of the Council

Approved December 25th 1812

NINIAN EDWARDS

UNITED STATES OF AMERICA,

STATE OF ILLINOIS.

} Office
ss.
} of Secretary

I, GEORGE H HARLOW, Secretary of the State of Illinois, do hereby certify that the foregoing is a true copy of a law passed at the 1st General Assembly of Illinois Territory as enrolled and printed in the Session laws 1812 on pages 38, 39 & 40, [70-71] and the original law having been lost from the files of this office this copy of the printed law as above designated is substituted therefor. _____ now on file in this office. In witness whereof I hereto set my hand and affix the Great Seal of State at the city of Springfield, this Twenty eighth day of November A. D. 1874.

GEO H HARLOW Secretary of State

[SEAL]

AN ACT Supplemental to the several Laws concerning the Militia.

SEC. 1. Be it enacted by the Legislative Council and House of Representatives and it is hereby enacted by the authority of the same That the Fines which may hereafter be assess'd by the Company Officers of any Militia Company in this Territory according to Law shall be collected by the Constables of the Townships in which such Militia Company may be or when the Persons reside on which such Fine shall be assess'd and it shall be the duty of the Commanding Officer of each Company within three months after any Fine shall be inflicted by the Officers of the Company to certify the same and deliver to the Constable a Certificate thereof which said Constable shall collect the amount thereof from the Person on whom the said Fine shall be inflicted in the same manner as if the same was an Execution from a Justice of the Peace and shall pay the amount thereof to the Commanding officer of the Company within forty days after the same shall come to his hands and shall be allowed by such Commanding officer ten Per Cent on the amount Collected which said Fines shall be appropriated by the Commanding Officers of Companies towards furnishing Colors and music for their Companies and other current expences thereof.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved Dec 25. 1812

NINIAN EDWARDS

AN ACT supplemental to an Act regulating the practice of the General Court and Common Pleas and for other Purposes.

SEC. 1. Be it enacted by the Legislative Council and House of Representatives and it is hereby enacted by the authority of the same. That no Suit shall hereafter be commenc'd in this Territory by any Person who is a non-resident or not a Freeholder therein untill he shall file in the Clerks office a Bond with sufficient security who shall be a Householder and Resident of the Territory or Freeholder therein condition'd for the payment of all Costs that may accrue in consequence thereof either to the opposite party or to the Officers of such Courts which Bond shall be in the Form or to the purport as are set forth in the Laws of the Territory now in force.

SEC. 2. And be it further Enacted that so much of the Laws of this Territory as require Rules to be held Monthly in the Clerks office of the General Court and Courts of Common Pleas shall be and the same are hereby repealed and that from and after the Passage of this Law the Plaintiff shall file his declaration in Court or on before the end of the Second day of the term to which the original writ shall be returnable to which the Defendant shall file his Plea in open Court in two Days thereafter to which the Plaintiff shall join issue or demur in case an issue is tendered one day thereafter and in case a replication is necessary such replication shall by the Plaintiff be filed in open Court within two days after the filing of the Defendants Plea and all further pleadings when necessary shall be filed according to such rules and regulations as the Court shall prescribe who are hereby required as far as it is practicable to cause all issues in Law and Fact to be made at the term to which the original writ is returnable so that the same may be tryed at the succeeding term but if the parties mutually agree to make up an issue at Law or in Fact and by the same at the return term such Trial may be had accordingly at such return term.

SEC. 3. And be it further Enacted That so much of the Laws of the Territory as directs Execution to be returnable at the Rule Days in the Clerks Office shall be and the same is hereby repeal'd and that from and after the passage thereof all writs of Execution shall be returnable on the first Day of the succeeding term of the Court from which such Execution shall issue Provided there be thirty Days between the Teste and return of such writs of Execution the Sheriff shall not be oblig'd to make return thereof before the first day of the second term after the Teste of such writ. This Law shall be in force from and after the Thirty first day of January next.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved Dec 25. 1812

NINIAN EDWARDS

AN ACT for the removal and safe keeping of the ancient Records and Papers in this Territory.

Whereas it has been suggested to this Legislature that certain interpolations and Forgeries have lately taken place in one of the

ancient record Books upon which the Titles of ancient Grants depend—And—Whereas the Legislature thereupon sent for one of those Record Books and inspected the same and are satisfied in their own minds an interpolation has been made therein—Therefore

SEC. 1. Be it enacted by the Legislative Council and House of Representatives and it is hereby enacted by the authority of the same—That it shall be the duty of the Recorder of Randolph County to deliver to the Secretary of this Territory on or before the fifteenth Day of January next all the ancient Books, Records and Papers which are filed in his office which bear date prior to the thirteenth Day of July in the year One Thousand Seven hundred & Eighty seven and shall take the said Secretary's receipt therefor which said Secretary is hereby authorised to file the same in his office and be safely kept by him as other Public archives & records of his office.

SEC. 2. Be it further enacted—That all copies or Transcripts which may be made by the said Secretary from the said Records or Papers and attested by him shall be as authentic in any Court of Record in this Territory as if given by the Recorder of any County and the Secretary shall never suffer or permit the said records or Papers to be inspected by any Person unless in his presence or in the presence of his express Agent. This act to be in force from and after the passage thereof.

GEO FISHER

Speaker of the House of Representatives

Approved Dec 25.1812

PIERRE MENARD

NINIAN EDWARDS

president of the Council

AN ACT concerning the General Court.

SEC. 1. Be it enacted by the Legislative Council and House of Representatives and it is hereby enacted by the authority of the same. That the General Court shall hereafter be govern'd and regulated by the Law of the Indiana Territory entitled "an act regulating the General Courts" approv'd 17th September 1807 except so far as the said Law may be repugnant to the enactments hereinafter made.

SEC. 2. Be it further enacted by the authority aforesaid—That the General Court shall hold two Sessions annually at Kaskaskia on the first Mondays in May and November yearly & every year at each of which Session the said Court shall go through with all the business depending before them.

SEC. 3. Be it further enacted by the authority aforesaid that the said General Court shall not hereafter take original Jurisdiction of any Sum under Five hundred Dollars.

SEC. 4. Be it further Enacted by the authority aforesaid that in all Cases and upon all points that shall be hereafter adjudicated by the said General Court each Judge thereof shall seperately make a plain but full statement of the Case or points decided which statement with his opinion thereon shall be by him reduced to writing & be recorded by the Clerk in a record Book to be provided for that purpose & for the convenience of recurring to their opinions it shall be the Duty of the Clerk to annex thereto at the expiration of each term an alphabetical List of the Cases decided.

SEC. 5. Be it further Enacted by the authority aforesaid that hereafter there shall be no Writ of Certiorari appeal or Writ of Error or any proceeding in the Nature of either to the General Court from any Court in this Territory upon any matter of Fact but in future the General Court shall take cognizance of Errors in Law only by writ of Error or appeal neither of which shall issue in any Case whatever untill after final Judgement in the Court of Common Pleas and in no case shall there be any appeal from the Judgement of a Court of Common Pleas on an appeal from the Judgement of a Justice of the Peace but that all appeals from the Judgement of Justices of the Peace shall be final in the Court of Common Pleas.

SEC. 6. Be it Enacted by the authority aforesaid that nothing in this Law contain'd shall be construed to affect any Suit now depending in the General Court either at Cahokia or KasKaskia but all those so depending shall be tried and finally dispos'd of as they would have been had this Law never passed.

SEC. 7. Be it further Enacted by the authority aforesaid that so much of the Law of the Indiana Territory establishing Circuit Courts be and the same is hereby repealed.

SEC. 8. Be it further Enacted by the authority aforesaid that all and every Law within the purview of this act shall be and the same are hereby repeal'd And that this act shall commence & be in force from the passage thereof.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved Dec 25. 1812

NINIAN EDWARDS

AN ACT *concerning fines and forfeitures*

Be it enacted by the Legislative Council and House of Representatives and it is hereby enacted by the authority of the same, That all fines and forfeitures that may hereafter be recovered in the respective Courts of Common Pleas shall be appropriated in behalf of the County levy in each county in which such fines and forfeitures shall be recovered any law to the contrary notwithstanding.

This act to commence and be in force from and after the passage thereof.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

President of the Council.

Approved December 25th 1812

NINIAN EDWARDS

UNITED STATES OF AMERICA,

STATE OF ILLINOIS.

} Office
} ss.
} of Secretary

I, GEORGE H HARLOW, Secretary of the State of Illinois, do hereby certify that the foregoing is a true copy of a law passed at the 1st General Assembly of the Illinois Territory as enrolled and printed in the Session laws 1812 on pages 48 & 49 [75-76] ; the original law having been lost from the files of this office this copy of the printed law as above designated is substituted therefor—
now on file in this office. In witness whereof I hereto set my hand and affix the Great Seal of State at the city of Springfield, this Twenty eighth day of November A. D. 1874.

GEO H HARLOW Secretary of State.

[SEAL]

AN ACT *to repeal an Act entitled “an Act to prevent unlawful Gaining”*

SEC. 1. Be it enacted by the Legislative Council and House of Representatives and it is hereby enacted by the authority of the same That the Law pass'd or adopted by the Governor and Judges of the Illinois Territory on the ninth day of March in the year One Thousand Eight hundred and ten entitled “an Act to prevent unlawful

Gaining'' shall be and the same is hereby repeal'd.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved Dec 25. 1812

NINIAN EDWARDS

AN ACT fixing the Salaries of certain Public Officers for one year.

SEC. 1. Be it enacted by the Legislative Council and House of Representatives and it is hereby enacted by the authority of the same. That the following shall continue for one year commencing from the first day of January next to be the Salaries of the Attorney General, Auditor of Public Accounts, and Territorial Treasurer: viz:

For the Attorney General the Sum of One hundred and seventy five Dollars, For the Auditor of Public Accounts the sum of One hundred and fifty Dollars, For the Public Treasurer the Sum of One Hundred and Fifty Dollars which said several Salaries shall be paid out of the Public Treasury. This Act to Commence and be in force from and after the passage thereof

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved Dec 25. 1812

NINIAN EDWARDS

AN ACT supplemental to an Act entitled "an Act concerning the General Courts.

SEC. 1. Be it enacted by the Legislative Council and House of Representatives and it is hereby enacted by the authority of the same. That any Person who shall hereafter commence a Suit in the General Court for any Tort and shall not recover a Sum amounting to or exceeding Five hundred Dollars shall be amerced in the Costs thereof any Law to the contrary notwithstanding. This Act to commence and be in force from and after the passage thereof.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved Dec 25. 1812

NINIAN EDWARDS

AN ACT supplemental to an Act entitled "an Act to fix the places of holding Courts in the several Counties."

SEC. 1. Be it enacted by the Legislative Council and House of Representatives and it is hereby enacted by the authority of the same That the Commissioners appointed by the Laws to which this is a supplement shall before they enter on the Duties enjoined on them with regard to fixing the seats of Justice in the several Counties take the following Oath or affirmation (as the case may be) before one of the Judges of the Court of Common Pleas or a Justice of the Peace to wit: I do solemnly swear or affirm (as the case may be) that I will honestly and faithfully fulfil to the best of my Judgement the duties required of me by Law and that in giving my opinion as to the proper place for fixing the Seat of Justice I will be intirely govern'd by what I esteem the true intent and meaning of the Law without favor partiality or affection for any Person or Thing—

This Law shall be in force from and after its passage.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved Dec 25. 1812

NINIAN EDWARDS

AN ACT for Printing the Laws of this Territory.

SEC. 1. Be it Enacted by the Legislative Council and House of Representatives and it is hereby enacted by the authority of the Same. That the Governor of the Territory shall be and he is hereby authoris'd to contract for the printing of Four hundred Copies of the Laws of this Territory and in payment for the same the said Governor shall be and he is hereby authoris'd to give an order or orders on the Auditor who shall issue a Warrant or Warrants for the same bearing interest from their dates respectively untill paid which shall be receiv'd in payment for Taxes or payable out of the General Fund

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved Dec 25. 1812

NINIAN EDWARDS

AN ACT making appropriations of Money for the ensuing year and for other Purposes.

SEC. 1. Be it so enacted by the Legislative Council and House of Representatives and it is hereby enacted by the Authority of the same. That the Sum of One Hundred Dollars is hereby appropriated for Contingent expences for the year One Thousand Eight hundred and thirteen and that all the Monies which shall be receiv'd into the Territorial Treasury during the Year One Thousand Eight hundred and thirteen except as above appropriated for contingent expences shall be a General Fund for all Monies allowed by Law which shall not be directed to be paid out of the contingent Expences. The said Sum of Money allowed for contingent expences shall be subject to the payment of such allowances as the Governor shall draw for on account of expresses and other incidents which may be necessary and cannot be foreseen by the Legislature and for the distribution of the Laws a statement whereof shall be laid by the Governor and the Auditor before the Legislature at the next Session.

SEC. 2. Be it further enacted that there shall be paid out of the Territorial Treasury on the Warrant of the Auditor to each Member of the Legislative Council and House of Representatives the Sum of Two Dollars Per day for each days attendance at the present Session of the Legislature and at the rate of two dollars per day for every Twenty Miles travel to and from the seat of Government to their places of residence by the most usual road.

SEC. 3. Be it further enacted that the Secretary of the Legislative Council and Clerk of the House of Representatives shall in like manner receive for their respective Services at the present Session the Sum of Three dollars each per day and the Enrolling and Engrossing Clerk and the Door keeper to both Houses shall receive the sum of Two Dollars each per Day for every days attendance at the present Session.

SEC. 4. Be it further enacted That the following persons be allow'd the sune hereinafter mention'd towit: To William Shannon for Stationary furnish'd to both Houses during the present Session Fourteen Dollars and Seventy five cents.

To Thomas Van Swearingen for sundry articles furnish'd during the present Session Four Dollars and Sixty two and an half Cents.

To William Morrison for an axe Four Dollars, To Philip Fouke for four Ink Stands, One Dollar. To Hugh H Maxwell agent for the

Heirs of Elijah Backus deces'd for a House for the use of the Legislature during the present Session One Dollar per day for each day the same may have been occupied. To Hugh H Maxwell for Fire Wood furnish'd to both Houses of the Legislature during the present Session the Sum of Ten Dollars.

SEC. 5. Be it further enacted that the Compensation which shall and may be due to the Members and Officers of the Legislative Council shall be certified by the President thereof and that those which may or shall be due to the Members and Officers of the House of Representatives as also the engrossing Clerk and Door keeper and to the said Hugh H Maxwell for House rent shall be certified by the Speaker of the House of Representatives which Certificate shall be to the Auditor sufficient evidence of Claim and he shall thereupon issue Warrants on the Territorial Treasury for the amount thereof which said Warrants shall bear interest from the date thereof untill paid at the Treasury.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved Dec 26. 1812

NINIAN EDWARDS

AN ACT to amend the Militia Law of the Territory.

SEC. 1. Be it enacted by the Legislative Council and House of Representatives and it is hereby enacted by the authority of the same— That the Brigade Major and inspector shall not hereafter be required to attend any Battallion Musters and that whenever a resignation of or removal from the Office of Adjutant General and Brigade Major and inspector shall take place the Governor of the Territory shall have a right to appoint an Adjutant General who shall execute the Duties of Brigade inspector and Major as well as the duties of Adjutant General.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved Dec 25. 1812

NINIAN EDWARDS

AN ACT concerning Clerks Fees in the Court of Chancery and for other purposes.

SEC. 1. Be it Enacted by the Legislative Council and House of Representatives and it is hereby enacted by the Authority of the same. That it shall be the Duty of the Clerk of the Court of Chancery to make up compleat records of Cases decided in the Court of Chancery in the same manner as the Clerks of the Courts of Common Pleas and Clerk of the General Court are now by Law directed to do and the Clerk of the said Court of Chancery shall be entitled to charge demand and receive the same Fees as in similar Cases is allowed by Law to the Clerk of the General Court. And where the business shall be different from that contain'd in the Bill of Fees allow'd to the Clerk of the General Court the said Court of Chancery shall regulate the same and make a record thereof and the said Clerk of the Court of Chancery shall put his Fee Bills into the hands of the Sheriff of the several Counties at the time as other Clerks are now by Law required to do which said Bills shall be collected in the same manner as other officers Fees.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved Dec 25. 1812

NINIAN EDWARDS

UNITED STATES OF AMERICA,

STATE OF ILLINOIS.

} ss.

Office of the Secretary of State.

I, Louis L. Emmerson, Secretary of State of the State of Illinois, do hereby certify that the foregoing is a true and correct copy of the Acts passed by the Legislative Council and House of Representatives, of the Illinois Territory in 1812, as compiled from the original Acts on file in this office.

IN WITNESS WHEREOF, I hereto set my hand and
[SEAL] affix the Great Seal of the State of Illinois, at the city of
Springfield, this 20th day of May, A. D. 1920.

LOUIS L. EMMERSON,
Secretary of State.

L A W S
AND
JOINT RESOLUTION
PASSED
BY
THE LEGISLATIVE COUNCIL
AND
HOUSE OF REPRESENTATIVES
OF
ILLINOIS TERRITORY
AT
THEIR SECOND SESSION
HELD
AT KASKASKIA
IN 1813

(From the first printing from the original records by
The Chipman Law Publishing Company, 1920.)

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LAWS OF ILLINOIS TERRITORY

Enacted in 1813.

AN ACT to enforce the assessment and collection of taxes in the counties of Madison StClair Johnson and Galletin for the year 1813 and for other purposes.

Whereas it has been represented to the General Assembly that the courts of Common Pleas in the counties of Madison and StClair omitted to appoint county commissioners in those counties until after the time required by law for county commissioners to finish and make return of the lists of Taxable property for the present year. And whereas it is also represented that the court of Common Pleas in the county of Johnson has failed to appoint any commissioner for said county. And that the County Commissioner for the County of Galletin has neglected to take in and return a list of lands in said county for the present year as the law requires therefore.

SEC. 1. Be it enacted by the Legislative Council and house of Representatives and it is hereby enacted by the authority of the same, that the sheriffs of Madison & StClair Counties shall and they are hereby authorised and required to collect the county and land tax in their respective counties according to the commissioners lists in their respective Counties for the present year and shall finish the same and make settlement with the auditor for the amount of land tax on or before the first day of March next and with the courts of Common Pleas in their respective counties for the county taxes at their first term for county business which shall be holden in the counties after the said first day of March next and shall be allowed the same credits for delinquents as if the assessment had been made and returned to them for collection by the time required by law and in case they or either of them shall fail to perform the duties required by this act by the time appointed, they shall be subject to be proceeded against in the same manner as if the lists had been made and put into their hands by the time required by aw.

SEC. 2. Be it further enacted, that the county commissioner who shall or may be appointed in the county of Johnson to list the taxable property in said county for the year 1814 shall also make and return lists of taxable property for the year 1813 which said county list and

list of land shall be proceeded upon in the same manner and be collected and accounted for at the same time and in the same manner as directed by law for the year 1814.

SEC. 3. Be it further enacted that the commissioner who may be appointed in Galletin County to make lists of Taxable property for the year 1814 in said county shall at the same time make and return a list of lands in said county for the present year, which said list so made shall be proceeded upon and collected and accounted for by the sheriff of said county at the time and in the same manner as directed by law for collecting and accounting for the taxes the year 1814.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved December 1st, 1813

NAT POPE

AN ACT to alter the June term of the court of Common Pleas in Randolph County.

Be it enacted by the Legislative Council and house of Representatives of the Illinois Territory and it is hereby enacted by the authority of the same That the term of the court of Common Pleas of Randolph county directed by law to be holden on the fourth Monday in June shall be and the same is hereby altered and changed to, & to be hereafter holden on the third monday in June yearly and every year, Any laws or parts of laws to the contrary notwithstanding, This act to commence & be in force from and after the passage thereof

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved December 1st 1813

NAT POPE

AN ACT to repeal an act entitled "an act concerning proceedings in civil cases"

Be it enacted by the Legislative Council and house of Representatives of the Illinois Territory. That an act entitled "an act con-

cerning proceedings in civil cases'' passed by the Legislature of this Territory at their last session and approved by the Governor the nineteenth day of December one thousand eight hundred and twelve be and the same is hereby repealed. This act to be in force from and after the passage thereof.

GEO FISHER

Speaker of the House of Repts.

PIERRE MENARD

president of The Council

Approved December 1st 1813

NAT POPE

*AN ACT for the relief of Dunkards, Quakers and other Religious
Persons conscienciously scrupulous of bearing Arms.*

Whereas it has been represented to the General Assembly that there are certain Religious denominations of Persons called quakers and Dunkards or Tunkers whose religious tenets or persuasions are averse to the principle of bearing arms and of Mustering as Militia men or being engaged in Military operations therefore

SEC. 1. Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory and it is hereby enacted by the authority of the same, That where any person now is or hereafter may be enrolled by any captain or commanding officer of any Militia company in this Territory and whose religious tenets or persuasions are averse to the principle of bearing arms or being engaged in Military operations, it shall and may be lawful for the captain or commanding officer aforesaid on the application of any such Militia man, to exempt him from attendance at any company, Battallian or Regimental muster upon the said Militia man producing annually to such commanding officer a receipt from the sheriff of the county for the sum of three Dollars which said receipt the sheriff is hereby authorised to give to any such Militia man on his paying the sum aforesaid which money so received by any sheriff shall be accounted for by him and paid into the county Treasury at the time of making his settlement with the court for the county taxes and shall be appropriated to the use of the county, Provided Nevertheless that nothing in this act contained shall be so construed as to exempt any such Militia man from being compelled to perform his tour of duty as other Militia men, when there shall be any detachment required

from the Militia of this Territory. But that all such Militia men shall perform such tour by himself or substitute as is now provided by law. This act shall commence and be in force from and after the passage thereof.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved December 1st 1813

NAT POPE

*AN ACT supplemental to an act to amend the Militia Law of
this Territory.*

Whereas it is incumbent on the Adjutant General hereafter to discharge the duties of the offices of Adjutant General and Brigade Major and Inspector and whereas the attention to the discipline of the Militia in a republic is at all times highly important, but more especially in this Territory so vulnerable to sudden and unexpected invasions by a savage enemy living on its borders; and whereas in the discharge of the duties of those offices, the Adjutant General will necessarily incur considerable expense and loss of time in recording and distributing the orders of the commander in chief and attending and inspecting the different Regiments in the Territory Therefore

SEC. 1. Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory and it is hereby enacted by the authority of the same That the Adjutant General shall receive an annual compensation of one hundred Dollars out of the public Treasury for the services required of him by law Provided however that the auditor of Public accounts shall not draw any warrant in favour of the Adjutant General until he shall receive a certificate from the Governor that the said Adjutant General has faithfully discharged all the duties required of him by law. That said Adjutant General shall produce to the Governor a certificate from the commandant of each Regiment, that he has performed all the duties required of him by law in his regiment and if it shall appear to the Governor from the returns made by the Adjutant General that he has failed in any part of his duty, then and in that case the Governor shall only certify to the auditor for what part of the salary

he may think him entitled to by the provisions of this act.

SEC. 2. Be it further enacted, That the Adjutant General as Brigade Major and Inspector shall not hereafter be required to attend more than two Days in any year in each Regiment for the purpose of superintending Regimental Drill musters any laws or parts of Laws to the contrary notwithstanding This act shall commence and be in force from and after the first day of January next.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved December 1st 1813

NAT POPE

AN ACT concerning Fines & Forfeitures.

SEC. 1. Be it enacted by the Legislative Council and House of Representatives and it is hereby enacted by the authority of the same, That all fines and Forfeitures that may hereafter be recovered in the respective Courts of Common pleas shall be appropriated in behalf of the County levy in each County in which such fine and forfeiture shall be recovered. Any Law to the contrary notwithstanding.

This act to commence and be in force from and after the passage thereof

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved December 1st 1813

NAT POPE

AN ACT Prohibiting the trading with Indians &c.

Whereas it has been represented by the Executive of this Territory and the chief of the tribe of the Kaskaskia Indians, that the vending of ardent spirits and other entoxicating liquors, to the Indians of the said tribe is productive of great evils to the community and of serious Injury to the said Tribe, and that to tolerate the purchase of arms, clothing, Horses, and other articles necessary for their use and comfort, would tend to encourage intemperance and wretchedness, to which these unfortunate beings are hastening for remedy whereof.

SEC. 1. Be it enacted by the Legislative Council & house of Representatives & it is hereby enacted by the authority of the same. That if any trader or other person whosoever residing, or coming into, or passing through the said Territory shall presume to furnish, vend, or sell, or shall procure to be vended, or, sold upon any account whatever to any Indian or Indians being within this Territory or waters adjoining to the same any Rum, Brandy, whiskey or other intoxicating liquor, he, she, or they so offending, shall on conviction of the same, by presentment or Indictment forfeit and pay for every such offence, any sum not exceeding twenty Dollars, nor less than five. One half to the use of the Territory and the other to the informer—

SEC. 2. Be it further enacted, that if any person or persons, shall purchase or receive of any Indian in the way of Barter or trade, a Gun or other article commonly used in hunting, or any instrument of Husbandry or cooking utensil—or clothing or Horse shall forfeit & pay any sum not exceeding fifty Dollars nor less than ten to the use of the Territory to be recovered as is directed in the former section one half to the use of the Territory and the other to the informer—Provided that nothing herein contained shall be so construed as to restrain any person from trading with Lewis Decoigne the chief of the Kaskaskia Indians for any article that he may Deem necessary in behalf of said tribe nor so as to impair or weaken the powers and authority that now are, or at any time hereafter may be vested in the Governor, or other person, as superintendent or agent of Indian affairs, or commissioner plenipotentiary for Treating with Indians, within this Territory. This act to be in full force from and after the first day of January next.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved Dec 8, 1813

NINIAN EDWARDS

*AN ACT to alter the time of holding Courts of Common Pleas in
Galletin County.*

Be it enacted by the Legislative Council and house of Representatives of the Illinois Territory and it is hereby enacted by the authority of the same That the terms of the court of Common Pleas in

Galletin County shall be and the same are hereby directed to be holden on the third Mondays in January, March, May, July, September and November yearly and every year. Any laws or parts of laws to the contrary notwithstanding. This act shall be in force from and after the first day of January next.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved Feb [sic] 8, 1813

NINIAN EDWARDS

AN ACT *to prevent the Migration of free Negroes and Mullattoes into this Territory and for other purposes—*

SEC. 1. Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory That it shall not be lawful for any free negro or mullatto to migrate in this Territory, and every free negro or mullatto who shall come into this Territory contrary to this act shall and may be apprehended and carried by any citizen before some Justice of the peace of the county where he shall be taken ; which Justice is hereby authorised to examine, and order to leave the Territory every such free negro or Mullatto, which said free negro or Mullatto shall be allowed from the time of his examination before the Justice of the peace fifteen days to depart from the Territory, and if after the expiration of the said fifteen days he or she shall be found in the Territory he or she shall be carried before a Justice of the peace who shall order him or her to be whipped on his or her Bare back not exceeding thirty-nine stripes nor less than twenty-five stripes and if he or she shall thereafter remain in the Territory fifteen days he or she may be punished in the same manner as aforesaid and so on as long as he or she shall refuse or fail to depart from the Territory.

SEC. 2. Be it further enacted that all free negroes and Mullattoes now residing in the Territory shall within six months after the passage of this act apply to the clerk of the court of Common Pleas of the County in which such negro or mullatto may reside to be registered and numbered by the clerk, which register shall specify the name, age, colour, and stature of said free negro or mullattoe, a copy of which register signed by the clerk shall be delivered to the said

free negro or mullatto for which the clerk shall demand of him or her the sum of fifty cents—Provided however that no negro or mullatto as aforesaid, shall claim the benefit of this section until he, she, or they produce to such clerk satisfactory evidence that he, she, or they is, or are entitled to freedom—Provided also that no negro or mullatto who is claimed as a servant or slave by any person or persons shall be entitled to the benefit of this section.

SEC. 3. Be it further enacted that if any such Free negro or Mullatto being of the age of twenty-one years shall neglect to procure such certificate it shall be the duty of any Justice of the Peace of the county wherein he or she may be found to order him or her to leave the Territory as in the first section of this act, and the said free negro or mullatto shall be subject to the same penalties for refusing to leave the Territory as is provided in the first section of this act.

SEC. 4. Be it further enacted that if any such free negro or mullattoe shall hereafter be convicted before any Justice of the peace of the county where the offence was committed, of stealing, or harbouring runaway negroes or mullattoes or slaves belonging to persons either in this Territory or elsewhere. The said Justice of the peace whose duty it shall be to take cognizance of such offences, shall order him or her to receive on his or her bare back not less than thirty-nine nor more than fifty lashes and the Justice shall order him or her to depart from Territory in thirty days, and if such free negro or mullatto shall neglect to depart accordingly, he or she shall be dealt with in the same manner as is provided in the first section of this act.

SEC. 5. Be it further enacted that any such free negro or Mullatto who is required by this act to register himself with the clerk as aforesaid, shall at the same time register with the said clerk in the same manner all such free negroes or Mullattoes residing with him or her as may be under the age of twenty-one years. And on failure thereof such free negroes & Mullattoes being under the age of twenty-one years may by any citizen be carried before the court of common pleas of the county, whose duty it shall be to bind them out until they attain the age of twenty-five years. This act to commence and be in force from and after the passage thereof.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved Dec 8, 1813

NINIAN EDWARDS

AN ACT *supplimental to an act entitled "An act regulating elections passed the twenty fifth day of December 1812.*

Whereas voters have hitherto been obliged by law to vote by Ballot, and the ignorant as well as those in embarrassed circumstances are thereby subject to be imposed upon by electioneering Zealots— And whereas it is inconsistent with the spirit of a Representative Republican Government. Since the opening for bribery and corruption is so manifest, which should ever be opposed and suppressed in such a Government, for remedy whereof

SEC. 1. Be it enacted by the Legislative Council and house of Representatives and it is hereby enacted by the authority of the same, that at all elections for a Delegate or Delegates to Congress, and for members of the General assembly of this Territory, all votes shall be given viva voca in presence of the Judges of the Election and all such candidates as may be present.

SEC. 2. Be it further enacted. That it shall be the duty of the sheriff of each County in which such Election may be holden to attend, and when the voter shall say for whom he votes, it shall be the duty of such sheriff to cry the name of the voter, and also the person or persons for whom he votes distinctly

SEC. 3. It shall be the duty of the clerks of the courts of common pleas to attend (in their respective counties) all such Elections as aforesaid, and keep the poll thereof in the manner herein after provided (that is to say) he shall enter the names of the candidates in a Book for that purpose to be kept, and shall also enter the name of each voter on the same Book, and shall designate for whom he votes by making a mark under the person or persons name or names for whom he votes directly opposite to such voter's name—for which service such clerks shall be allowed the sum of two Dollars per day for each day they may be required to attend such elections, any laws or parts of laws to the contrary notwithstanding. This act to commence and be in force from and after the passage thereof.

GEO. FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved. Dec, 8 1813

NINIAN EDWARDS

AN ACT to repeal an act entitled "An act concerning appeals from the Judgments of Justices of the Peace to the County Courts.

Be it enacted by the Legislative Council and house of Representatives of the Illinois Territory. That an act entitled "An act concerning appeals from the Judgments of Justices of the peace to the County Courts, adopted from the Kentucky Code and passed by the Governor and Judges of the Illinois Territory on the twenty sixth day of January in the year one thousand eight hundred and ten be and the same is hereby repealed.

SEC. 2. Be it further enacted that appeals from the Judgments of Justices of the peace, shall hereafter be regulated by an act entitled "an act, establishing courts for the trials of small causes" passed by the General Assembly of the Indiana Territory on the Seventeenth day of September in the year of our Lord one thousand eight hundred and seven any thing in any law to the contrary contained notwithstanding

SEC. 3rd. Be it further enacted, that in all cases where any Justice of the Peace in any action brought before him, shall enter Judgment against the plaintiff for the sum of two Dollars or upwards the said Plaintiff shall have a right to appeal therefrom in the same manner as appeals are provided for by this law. Any law or usage to the contrary contained notwithstanding.

This act to be in force from and after the passage thereof.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved Dec 9, 1813

NINIAN EDWARDS

AN ACT to Regulate proceedings in civil cases and for other purposes.

SEC. 1. Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory. That it shall be the duty of every person suing out a writ to file by himself or agent with the clerk of the proper Court a declaration or Petition to the Court or other Statement in writing, containing the true nature of his, her, or their demands or complaint and if upon any instrument of writing or account such declaration petition or statement shall be accompanied with a copy of the writing or account whereupon the clerk of the court

shall endorse on such declaration petition or Statement or attach thereto an order to the sheriff in the nature of a summons if Bail be not required or a *capias* if Bail be required, which said summons or *capias* shall be returnable to the next succeeding court if there be fifteen days between the date thereof and the court, otherwise the said clerk shall make the said summons or *capias* returnable to the second court after the date thereof.

SEC. 2. It shall be the duty of the Sheriff to execute each writ on the Defendant fifteen days before the Term to which it is made returnable, by reading the Declaration, and summons to the Defendant if the Defendant does not refuse to hear, but if the Defendant refuses to hear him read then it shall be the duty of the Sheriff to inform him of the contents of the summons—If upon a *capias* the sheriff shall take the Defendant into custody, and read to him the Declaration, and *Capias* in all cases upon summonses and *capiases* it shall be the duty of the Sheriff if required, to deliver to the Defendant a copy of the Declaration, and summons, or *capias*, upon the Defendant's paying to him for copying the same, at the rate of fifteen cents for each hundred words.

SEC. 3. It shall be the duty of the sheriff to whom such writ of *capias ad respondendum* may be directed to take the Body of the Defendant or Defendants, and commit him or them to the Common Jail of the County or to take a Bond to himself from the Defendant with sufficient surety or sureties conditioned that the Defendant or Defendants (as the case may be) if Judgment be given against him or them, shall pay and satisfy the costs and condemnation of the court or surrender his, her, or their body or bodies in execution for the same or that, the surety or sureties will do it for him or them—Which Bond the sheriff shall return together with the Writ on the first day of the Term to which the Writ is returnable—And if the sheriff does not return a Bail Bond, or the Bail returned be adjudged insufficient by the Court, and the Defendant or Defendants shall fail to perfect, his, her, or their Bail instant, if ruled to perfect Bail the sheriff shall be made a Co-Defendant and be entitled to the same rights, and liable to the same Judgment that he would have been if he had been made Defendant by the Writ. Provided that all questions concerning the sufficiency of Bail shall be made and determined at the Court to which the writ is returnable—And Provided also that in civil cases no person shall be held to Bail in a county in

which he does not reside if he be a resident of the Territory—And if any such person shall be arrested and imprisoned or held to Bail in a civil cause, he, she, or they may be discharged from his, her, or their arrest or imprisonment or Bail upon Habeas Corpus issued by a Judge of the General Court of Court of Common Pleas unless the plaintiff can shew to the Judge that the debt was contracted or to be paid in the county where the arrest is made or that the Defendant or Defendants are removing from the Territory. In case he, she, or they, be discharged by the Judge as aforesaid, the suit shall progress in the same manner, as if Bail was not required.

SEC. 4. In all cases where the Bail shall be Judged insufficient and Judgment shall be obtained against the Sheriff he shall have the same remedy against the Estate of the Bail as against the estate of the Defendant.

SEC. 5. Persons who may hereafter become bound in a Bail Bond as aforesaid may surrender the Defendant or Defendants in the same manner as by law the special Bail heretofore had a right to do. If the Bail wishes to surrender the Defendant before the return of the writ he may apply to the sheriff for a Bail piece who is hereby authorised and required to grant the same upon the application of the Bail or his agent and after the return of the writ it shall be the duty of the clerk of the court into which the writ is return'd to grant a Bail piece upon the application of the Bail or his agent whenever applied for, which Bail Piece so as aforesaid granted, whether by the sheriff or clerk, shall be a sufficient authority to the Bail to arrest the Defendant and surrender him in Custody in discharge of his recognizance.

SEC. 6. It shall be the duty of the Defendant or Defendants to file his or their plea on or before the end of the third day of the Term to which the writ is returnable and if any part of the pleadings are adjudged bad, immaterial or insufficient the party shall be required to plead to the merits instanter—If the Defendant fails to file his plea as aforesaid the plaintiff may on the fourth or any subsequent day of that Term or any other Term sign Judgment on the records of the Court for want of a plea and take out a writ of Enquiry to the next succeeding Term, in all cases where the Damages claimed are unliquidated—But in all cases where the Demand is liquidated and reduced to writing for the payment of money, the court shall at the first term upon a Judgment by Default calculate the Interest and

confirm the Judgment for the principal and interest really due and execution may issue thereon as on other Judgments.

SEC. 7. Either party may if he pleases order the cause to be continued to the second Term—and if the plaintiff does not file his replication at the first term he shall be at liberty to serve the Defendant or Defendants with a copy of his replication fifteen days before the next term—But if the plaintiff fails to do so his suit shall be dismissed at the second Term and Judgment shall be rendered against him for costs—If the Plaintiff files his replication at the first term or serves the Defendant with a copy of it fifteen days before the second Term both parties shall proceed to trial at the second Term unless good cause is shewn for a continuance or the parties agree to a continuance.

SEC. 8. Whenever any suit shall be brought in any court of this Territory founded on any writing signed by the Defendant or having his name thereto signed whether the same be under seal or not the Defendant shall not be permitted to deny the execution thereof unless he does it on oath accompanying his plea—And if the Defendant fails to deny it on oath in Manner aforesaid the said instrument of writing shall be received by the court and given in evidence and be competent to prove the Debt or duty for which it may appear to have been given—And the Defendant shall be entitled to have oyer of all instruments of writing whether under seal or not upon which the plaintiff declares in his declaration.

SEC. 9. When a Judgment is arrested the plaintiff shall not be obliged to bring a new suit, provided the first declaration and writ be sufficient, but the court may order new pleadings to commence where the error causing the arrest began—And when a Judgment is arrested the party committing the error shall pay the costs occasioned thereby.

SEC. 10. No Court of Common Pleas shall have original Jurisdiction of any suit cognizable by a Justice of the Peace in this Territory—

SEC. 11. No plaintiff shall suffer a nonsuit after the Jury have retired from the Bar to make up their Verdict.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved Dec 9. 1813

NINIAN EDWARDS

AN ACT Regulating the General Court.

SEC. 1. Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory and it is hereby enacted by the authority of the same. That there shall be holden and kept at the seat of Government of this Territory a supreme court of Record to be called and styled the "General Court." The sittings of which Court shall be held at Kaskaskia in the County of Randolph on the first Mondays in April and September, yearly and every year, and the Judges of the said Court and every of them shall have power and authority as often as there may be occasion to issue forth writs of Habeas Corpus, Certiorari and writs of error, and all remedial, and other writs, and process returnable to the said Court and grantable by said Judges by virtue of their office.

SEC. 2. Be it further enacted that the said Court shall hear and determine all causes matters and things cognizable in the said Court and also to hear and determine all, and all manner of pleas Plaints & Causes which shall be removed or brought there, from the respective courts of Common Pleas or from any other court to be holden for the respective Counties, and to examine and correct all & all manner of errors of the Judges of the inferior Courts in their Judgments, process, and Proceedings in the said Courts as well as Pleas of the United States as in all pleas, real, personal and mixed and thereupon to reverse or affirm the same Judgments as the law shall or doth direct, and also to examine, correct and Punish, the contempts, omissions and neglects, favours, corruptions and defaults of all or any of the Justices of the peace, sheriffs, coroners, clerks, and other officers within the respective counties.

SEC. 3. Be it further enacted. That the said General Court shall have power to award, Process, as well for levying such fines, forfeitures and amercements as shall be estreated into the said General Court as of the forfeitures and amercements which shall be taxed and set there and not Paid to the uses they are or shall be appropriated, and generally shall minister ample Justice to all persons, and amply exercise the Jurisdictions and Powers herein mentioned concerning all and singular the premises according to law.

SEC. 4. Be it further enacted, That all writs issuing from the said Court shall run in the name of the United States of America and bear teste in the name of the Clerk of the General Court on the days on which the said writs shall be issued, and shall be sealed with

the Judicial seal of the said Court and made returnable according to law.

SEC. 5. Be it further enacted, That the said Court shall have power from time to time to deliver the Jails of all persons who now are or shall hereafter be committed for Treasons, murders, or such other crimes as by the laws of the Territory now are or shall hereafter be made capital or felonies of death as aforesaid and for that end from time to time to issue forth such necessary precepts and process and force obedience thereto as Justices of Oyer and Terminer, and of Jail delivery may or can do within the United States.

SEC. 6. Be it further enacted That so much of the sixth section of an act entitled "An act regulating the General Court, passed by the General assembly of the Indiana Territory on the seventeenth day of September 1807 as authorises and empowers the Governor of the Territory to issue a commission for holding a special Court of Oyer & Terminer in any county directed to the Judges of the General Court or any one of them, shall be and the same is hereby repealed.

SEC. 7. Be it further enacted, that whenever any person shall be in the custody of the sheriff of any County charged with any offence exclusively cognizable by the General Court. It shall be the duty of such sheriff to give information thereof in writing to any of the Judges of the General Court, who shall thereupon issue a precept under his hand and seal to the sheriff of such County, commanding him to summon twenty-three Grand Jurors and thirty six petit Jurors to attend at the seat of Justice of the said County on a day therein mentioned which shall not be less than thirty nor more than sixty days from the date of such precepts.

SEC. 8. Be it further enacted, That it shall be the duty of such sheriff on receiving the precept aforesaid to give notice by advertisement set up at the seat of Justice of the said County at least twenty days before the return of such Precept of the time and place of holding a special session of the General Court in pursuance of this act and the Judge issuing his precept as aforesaid shall personally or in writing notify the other Judges of the said court, the clerk of the said court and the attorney General of the time and place of holding a General Court in pursuance of this act. But the want of such advertisement by the sheriff or of such notice by the Judge shall not be construed to invalidate the authority of the Court or to render its proceedings erroneous but in case of such omission, the precept afore-

said shall be considered legal notice of the time and place of holding a General Court by virtue of this act and the sheriff for omitting to advertise in manner aforesaid may be fined by the Court in a sum not exceeding five hundred Dollars and not less than one hundred Dollars.

SEC. 9. The said Court when met in pursuance of this act shall have authority to adjourn to any day which may be adjudged reasonable and expedient for the fair and impartial trial of any person who may be Indicted before the same Court.

SEC. 10. Be it further enacted, That in case the requisite number of grand or Pettit Jurors should not attend at the time and place mentioned in such precept or the number of Pettit Jurors be reduced by challanges below twelve, the Court may order the sheriff to complete the panel of the grand Jury or petit Jury from the Bystanders or award a Venire for a grand or petit Jury as the case may require.

SEC. 11. Be it further enacted, That in order to compel the due attendance of Jurymen in the said General Court and all other Courts in this Territory it is hereby enacted and declared that if any person shall be duly summoned to attend any Court of Judicature to serve on a Jury or any inquest required by law and shall neglect or refuse to give his attendance on the day and during the time his service is necessary, for every such person so offending shall be fined for every such offence in the Genl. Court by the said Court in any sum not exceeding eight dollars, and for every such offence in any Court of Common Pleas of any County in the Territory by the said Court any sum not exceeding five dollars, unless the delinquent shall at the same or next succeeding term render to the said Courts respectively a reasonable excuse for such neglect or refusal it shall be the duty of the said General Court & courts of common pleas, and they are hereby empowered and required on failure of such delinquent to render such reasonable excuse, to issue a writ to the sheriff of the county to levy the said fines on the the Goods and chattels of every such delinquent to be paid to the clerk of the General Court and clerks of the courts of common pleas. But where any delinquency in the attendance of Jurors summoned to attend any special Session of the General Court may happen and the delinquent fails to make his excuse at the term to which he may have been summoned it shall and may be lawful for him to make his excuse to the said court at their next stated Term, in writing which shall be sworn to and subscribed before some Judge of the court of Common Pleas or Justice of the

peace in the Territory and in all cases where the excuse shall be deemed insufficient by the court they are hereby authorised to issue process directed to the sheriff of the county in which the delinquency may have happened commanding him to levy the fine on the goods and chattels of every such delinquent—

SEC. 12. Be it further enacted, That all fines amercements and forfeitures which shall be inflicted by the said General Court under any of the Laws of this Territory, shall be paid to the clerk of the said court, and by him annually on or before the first day of October paid into the Territorial Treasury for the use of the Territory, That all amercements, fines, & forfeitures inflicted by the said court at any special session held by the said court in any county shall be paid to the sheriff of the county where the same shall be inflicted and by the said sheriff accounted for annually and by him paid into the County Treasury for the use of the county—That the expences of any prosecution or Prosecutions before the said court at any special Session as aforesaid where the defendant or defendants shall be acquitted or discharged, or unable to pay the fees such fees shall be paid by the county in which such prosecution shall be instituted.

SEC. 13. Be it further enacted, That it shall be the duty of the sheriff of Randolph County to attend and execute the process and orders of the General Court within his county and it shall be the duty of each and every sheriff in this Territory to attend and execute the orders and Process of the said court at any special Session thereof which shall and may be held in his county. And it shall be the duty of the sheriff of Randolph County at least five days previous to the commencement of each stated term of the General Court to summon thirty six House Keepers to attend the said court as Pettit Jurors. No grand Jury shall be hereafter summoned to attend the General Court at their stated terms to be holden at Kaskaskia unless the attorney of the United States for the Territory shall convince the said court, or some Judge thereof in vacation that it is necessary to have a grand Jury summoned to present offences that may have been committed against the Laws of the United States, which court or Judge is hereby authorised to issue a precept directed to the Marshal of the Territory, commanding him to summon twenty three house holders to appear at the said court as a grand Jury. From and after the passage of this act the grand Juries sworn before the courts of common pleas in the several Counties shall be charged to enquire as

well of all offences cognizable by the General Court which may be committed in their respective Counties, as of offences cognizable and triable by the courts of common pleas—And when any such grand Jury shall make a presentment of any offence, or find an indictment only cognizable by the General Court, the said courts of common pleas in their respective counties shall have power, and hereby are required to issue proses to apprehend the offender, and, when the offender shall be in custody, the sheriff of the proper county shall forthwith give notice thereof to one of the Judges of the General Court.

SEC. 14. Be it further enacted, That the said General Court shall not take original Jurisdiction at Common law of any sum under five hundred Dollars, and if any person shall hereafter commence a suit in the General Court and shall not recover a sum amounting to, or exceeding five hundred Dollars such person shall be amerced in the costs of such suit.

SEC. 15. Be it further enacted, That the senior or presiding Judge of the General Court, shall collect and he is hereby enjoined to collect make up and deliver in writing a plain but full statement of the case on all points or questions of law with the opinion of the court thereon, which opinion shall be by the said Judge delivered to the clerk and by him recorded at full length upon the Records of the said court and should either of the said Judges differ in opinion the dissenting Judge shall have the reasons of his dissent entered of Record in said suit.

SEC. 16. Be it further enacted. That there shall not hereafter be any writ of Certiorari appeal, or writ of error or any proceeding in the nature of either to the General Court from any court in this Territory upon any matter of fact, but in future the General Court shall take cognizance of errors in law only but writ of error or appeal neither of which shall issue in any case whatever until after final Judgment in the court of common pleas on an appeal from the Judgment of a Justice of the peace but that all appeals from the Judgments of Justices of the peace shall be final in the courts of Common Pleas.

SEC. 17. Be it further enacted. That the Judges of the General Court, shall be and they are hereby authorised to exercise the powers and authority usually exercised by a court of chancery.

SEC. 18. Be it further enacted. That in all suits in chancery

in the said General Court the rules and methods which regulate the high court of chancery in England, shall as far as the said General Court may deem the same applicable, be observed except as hereinafter mentioned.

SEC. 19. Be it further enacted, that if the said General Court shall not set or be opened on or before the end of the three first days of the Term the court shall not afterwards be opened at that Term but stand adjourned until court in course, and all writs and process then returnable, and bills, suits, pleadings and proceedings before the said court shall be continued of course until the next term, and from term, to term until the court shall set.

SEC. 20. Be it further enacted, that the said court in term or any Judge in vacation shall be authorised to grant writs of ne exeat Injunction, Certiorari or other process usually granted by a court of Equity.

SEC. 21. Be it further enacted, that if the complainant in chancery resides out of the Territory, he shall before issuing of process to appear cause a Bond to be executed by at least one sufficient person being a free holder and resident of the Territory, to the defendant in the penal sum of two hundred Dollars, conditioned to prosecute the suit with effect & to pay costs if the defendant should be entitled thereunto and to have the same filed with the clerk in default whereof the said complainant's Bill shall be dismissed with costs.

SEC. 22. Be it further enacted That any complainant in chancery residing within the Territory shall at the discretion of the court give security in the manner and form as is required in case of non residents.

SEC. 23. Be it further enacted. That any subpoena process of sequestration writ of execution or other writ or process in chancery shall be issued by the clerk at the instance of the party applying for same.

SEC. 24. Be it further enacted that in all cases in chancery the rules to plead, answer, reply, rejoin, or other proceedings when necessary shall be given in open court and be entered in a Book to be kept for that purpose for the information of all parties, attorneys, or consellers therein concerned.

SEC. 25. Be it further enacted, That no subpoena in chancery shall issue until the Bill be filed with the clerk, whose duty it shall be to copy the same and to deliver a copy to the person applying for

the subpoena; which copy shall be delivered to the Defendant if within the Territory, by the officer or person serving the subpoena; which service and delivery shall be endorsed on the back thereof and if there be more than one Defendant, the said copy shall be delivered to the one first named in the subpoena if he be resident within this Territory if not, the next one named in the subpoena that is a resident.

SEC. 26. Be it further enacted. That if any defendant in chancery if but one or defendants if more than one reside out of the Territory or cannot be found to be served with process of subpoena, or abscond to avoid being served therewith, public notice shall be given to the defendant, or defendants signed by the clerk in any Newspaper printed in this, or any adjoining state or Territory, as the court shall direct, that unless he, she, or they appear and file his, her, or their answer by a day given him or them by the court, the Bill shall be taken pro confesso. And when a Bill is amended, a copy of the amendatory Bill shall in like manner be delivered to the defendant or defendants.

SEC. 27. Be it further enacted, That in suits in chancery, the complainant may take depositions in one month after filing his Bill provided he first obtain a Dedimus for that purpose, before any Judge or Justice of the peace, & the defendant may do the like as soon as he has filed his answer, Provided that reasonable notice be given of the time and place of taking such Deposition, which reasonable notice shall in all cases be ten days and over the ten days, one day for every twenty miles travel from the place of holding court to where the witness or witnesses are to be sworn and examined.

SEC. 28. Be it further enacted, That if the Defendant in chancery does not file his answer in the time prescribed by the rules of the court having also been served with process of subpoena, with a copy of the Bill, or notice as required by this act, the complainant shall proceed on to hearing as if the answer had been filed and the cause at issue. Provided however that the court for good cause shewn may allow the answer to be filed and grant a further day for such hearing.

SEC. 29. Be it further enacted that any defendant in chancery may swear to his answer before any Judge of this court, or any Judge of a court of common pleas or Justice of the peace, and if the Defendant resides out of the Territory, he may swear to his answer before any Justice of the peace, of a county, city, or Town Corporate, the common seal of any court of Record of such

county, city or Town Corporate, being thereto annexed.

SEC. 30. Be it further enacted. That the complainant in chancery having obtained a decree, and the defendant not having complied therewith by the time appointed, it shall be lawful for the said court to issue a writ of fieri facias against the goods and chattels, lands and tenements and hereditaments of the Defendant upon which sufficient property shall be taken and sold to satisfy the said demand with costs or to issue a capias ad satisfaciendum against the Defendant. Upon Writs of fieri facias and capias ad satisfaciendum there shall be the same proceedings as at law, or cause by Injunction the possession of effects and Estate demanded by the Bill, and whereof the possession or sale is decreed to be delivered to the complainant, or otherwise according to such decree, and as the nature of the case may require.

SEC. 31. Be it further enacted. That when a decree in chancery shall be made for a conveyance, release, or acquittance, and the party against whom the decree shall pass shall not comply therewith by the time appointed then such decree shall be taken and considered in all courts of Law and Equity to have the same operation and effect, & be as available as if the conveyance release, or acquittance had been executed conformably to such order.

SEC. 32. Be it further enacted, That a decree in chancery shall from the time of its being signed, have the force, operation, and effect of a Judgment at law from the time of the actual entry of such decree and a writ of fieri facias issued on any decree in chancery shall bind the goods of the person against whom it is issued from the time it was delivered to the sheriff or officer to be executed as at law.

SEC. 33. Be it further enacted, That there shall be appointed and commissioned by the Governor a clerk to the said court who shall enter into bond to the Governor with security to be approved by the Governor in the penalty of one thousand dollars conditioned for the performance of such duties as are or may hereafter be required of him by law which bond shall be filed in the office of the Secretary of the Territory, which said clerk shall be entitled to same fees and salary as by law are now or which may be hereafter allowed him, and shall perform such duties as are by law required of him.

SEC. 34. Be it further enacted, That no Injunction in chancery shall be granted to stay proceedings at Law unless the party praying the Injunction have at least proved that the opposite party (if living

in the Territory if not his agent or attorney of Record) had at least ten and not more than fifteen days notice of the time and place of applying for such Injunction, from the time of which notice given all proceedings shall be stayed until the court or Judges decision shall be made, whether an Injunction shall, or shall not be granted, but if the complainant shall not make application for such Injunction on the day specified in such notice, then the plaintiff at Law may proceed as if none had been given nor shall any Injunction be granted to stay any Judgment at Law, for a greater sum than that the complainant shall shew himself equitably not bound to pay and so much as shall be sufficient to cover the costs and every Injunction when granted shall operate as a release to all errors in the proceedings at law that are prayed to be enjoined, nor shall any Injunction be granted, unless the complainant shall have previously executed a Bond to the defendant with sufficient security to be approved of by the court or Judge granting the Injunction in double the sum prayed to be enjoined conditioned for the payment of all monies and costs due or to be due to the plaintiff in the action at Law, and also all such costs and Damages, as shall be awarded against him or her, in case the Injunction shall be dissolved. If the Injunction shall be dissolved in whole or in part, the complainant shall pay six per cent exclusive of legal interest beside costs, and the clerk shall issue an execution for the same when he issues an execution upon said Judgment. On the dissolution of an injunction Judgment shall be given by the court against the sureties as well as the complainant in the Injunction Bond.

SEC. 35. Be it further enacted that whenever affidavits are taken either to support or dissolve an Injunction, the party taking the same shall give the adverse party reasonable notice of the time and place of taking the same and the clerk shall issue to either of the parties subpoenas to procure the attendance of witnesses at the time and place appointed— And such affidavits taken as aforesaid may be read on the final hearing of the cause in which they may be taken, under the same restrictions as depositions taken according to law.

SEC. 36. Be it further enacted, That no notice shall be necessary in any case where application is made for an Injunction in Term time, (where the Judgment was rendered in the General Court, but if the Judgment be rendered in any other court, notice shall be required of an application in Term time for an Injunction, unless as is hereinafter provided) nor in vacation where the title or Bonds for lands

shall come in question, and that no Injunction to stay proceedings at Law shall be granted after sixty days next succeeding the end of the Term at which the Judgment sought to be enjoined was rendered.

SEC. 37. Be it further enacted, that writs of Ne Exeat shall not be granted but upon Bill filed, and affidavit to the allegations, which being produced to the court in term time or the Judge in vacation, he or they may grant or refuse such Writ as to him or them shall seem meet, and if granted, he or they shall endorse thereon in what penalty, Bond, & security shall be required of the defendant. And that no writ of ne exeat shall issue until the complainant shall give Bond and security in the clerks office to be approved by the Judge or court, and in such penalty as he or they shall adjudge necessary to be endorsed on the Bill And in case any person stayed by such writ of Ne Exeat shall think himself or themselves aggrieved, he or they may Bring suit on such Bond, and if on trial it shall appear that the writ of Ne Exeat was prayed without a Just cause the person injured shall recover damages.

SEC. 38. Be it further enacted, That if the defendant or defendants in chancery shall go out of the Territory, but shall return before a personal appearance be necessary to perform any order or decree of the court such his or her temporary departure, shall not be considered as a breach of the condition of the Bond. And whenever the defendant to a Bill in chancery, shall give security that he will not depart the Territory, the security shall have leave at any time before the Bond shall be forfeited, to secure his principle in the same manner that special Bail may surrender their principal and obtain the same discharge.

SEC. 39. Be it further enacted. That the said General Court shall have cognizance of all cases in equity amounting to or exceeding one hundred Dollars. But if any Bill in chancery shall be brought touching any matter or thing, real, or personal, which shall not be of the value of one hundred Dollars the same shall be dismissed with costs.

SEC. 40. Be it further enacted, That all suits process and proceedings whatsoever now depending before the General Court at Kaskaskia shall be returned to and proceeded on at the terms of the said General Court directed to be holden under this act, and shall be prosecuted on to final Judgment and execution in all things as fully as the same might or could have been done had this act not have been passed.

SEC. 41. Be it further enacted, That all suits, process and proceedings whatsoever now pending in the General Court at Cahokia shall be proceeded on, and the court be held at Cahokia aforesaid in the same manner as is now provided by law and as if this act had not passed until the first day of November next, after which time, the papers, Books, and proceedings then being at Cahokia in the General Court, shall be removed to Kaskaskia and be proceeded on as above provided for the Business pending before the said court at Kaskaskia. All laws and parts of laws coming within the purview of this act, shall be and the same are hereby repealed. This act to commence and be in force from and after the passage thereof.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved Dec 10. 1813

NINIAN EDWARDS

*AN ACT to fix the places of holding Court in the counties of Madison
St Clair and Johnson.*

SEC. 1. Be it enacted by the Legislative Council and house of Representatives of the Illinois Territory and it is hereby enacted by the authority of the same That the courts in the counties of Madison & St Clair shall be holden at the following places in the said counties (until the Judges of the respective courts of common pleas in those counties shall provide proper accommodations at the places to be fixed upon by the commissioners in the respective Counties as is hereinafter provided) viz. In County of Madison at the House of Thomas Kirkpatrick and in the county of St Clair at the court house in Cahokia.

SEC. 2. Be it further enacted that for the purpose of fixing the permanent seats of Justice in the counties of Madison and St Clair the following persons are hereby appointed commissioners in the said counties, viz. in the county of Madison, Paul Beck, Doct. Cadwell, Alexander Waddle George Moore, James Rentfrow, John Kirkpatrick, and Ephraim Wood In the County of St Clair, Doct. Carnes, John Hays, Isaac Enoch, Nathan Chambers, William Scott Jun. Jacob Short, and James Lemon Sen. which said commissioners or a Majority of them shall meet at such times and places as may be directed by the

courts of Common Pleas for the said counties respectively provided that the time of meeting shall not be extended beyond the first monday in April next and if the commissioners or a Majority of them shall fail to meet at the time and place above specified it shall and may be the duty of said Judges in vacation or at any other term or terms to notify said commissioners until they shall designate the county seat and make their returns to the next court after they have determined upon the particular place which said commissioners shall before some Judge or Justice of the peace take the following oath, (viz.) I. AB. do solemnly swear or affirm as the case may be that in fixing on the place to erect public building for——— County I will well and truly perform the duties imposed on me by an act of the General Assembly entitled “an act to fix the places of holding courts in the several Counties of Madison and St Clair to the best of my knowledge and abilities and in fixing on the said place as required by law I will exercise the powers in me vested without partiality, fear, favour, or affection, so help me god. which said commissioners on being thus sworn shall forthwith proceed to examine for, and designate the places for the counties of St Clair, Madison & Johnson as near the centre as may be convenient to the present population thereof for erecting the public Building for their respective counties at such time and place as may be appointed by their courts of Common Pleas respectively taking into view the situation of the settlements, the Geography of the country, the convenience of the people, and eligibility of the place, which place so fixed & determined on, the commissioners shall certify under their hands and seal and return the same to the next court of common pleas in their counties which said court shall cause an entry thereof to be made on their records, and it shall be the duty of the court of common pleas in the said counties as soon as practicable after the place so designated, shall be fixed upon to cause suitable buildings to be provided thereat and to cause a purchase of such quantity of land to be made for the use of the county and to erect a court house and Jail and to make such other improvements thereon as they may deem expedient from time to time.

SEC. 3. Be it further enacted that in order to carry this act into as early an operation as possible, the members of the Council and house of Representatives from each county, shall carry one copy of this act with them when they return to their respective Counties for the information of the courts of common pleas and all persons concerned. And that the said commissioners be allowed the sum of one

dollar per day for their Services to be paid by the county and out of the county levy and if the said commissioners shall fail to attend when notified by the court of common pleas they shall forfeit and pay a sum not exceeding five Dollars nor less than two Dollars as their courts of common pleas shall think proper.

SEC. 4. Be it further enacted that the following persons are hereby appointed commissioners for the county of Johnson (viz.) James Whitesides, Jonas Hibbs & Joseph Palmer, Owen Evans John B. Murry—shall be the commissioners for Johnson County, who shall convene or a majority of them on the first day of January next and who in all other respects shall conform their proceedings herein to an act entitled “an act to fix the places of holding courts in the several counties.” passed by the General Assembly of this Territory on the 25.th day of December last. But should a majority of said commissioners fail to convene on the day aforesaid, it shall be their duty to convene at any day of said month thereafter and proceed to the completion of the duties aforesaid provided the whole of the Business be finished on or before the twenty fifth day of April next

This act to commence and be in force from and after the passage thereof

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved Dec 10. 1813

NINIAN EDWARDS

AN ACT supplemental to an act entitled “an act authorising the Granting of Letters Testamentary and letters of administration, for the Settlements of Intestates estates and for other purposes.

Whereas it appears that there is no law provided to authorise the Judges of the courts of Common pleas to issue any compulsory process against Executors or Administrators in vacation of the courts sitting, and a considerable length of time between terms—which sometimes subjects Estates to considerable loss. For remedy whereof.

SEC. 1. Be it enacted by the Legislative Council and House of Representatives, of the Illinois Territory and it is hereby enacted by the authority of the same That on complaint made to any Judge of the court of Common pleas between term times of said court, that any

Estate is likely to be embezzled or wasted in any manner whatever, by any executor or Administrator, Guardian or others— The said Judge is hereby empowered and authorised to issue such necessary process, against any such Executor or administrator in the same manner as might or could be done if sitting in a regular Session at the times prescribed by law, and on hearing such case if the said Judge should be of opinion that such complaint is well founded, he is hereby authorised to summon one other Judge to his assistance and hold a special session in which they are hereby empowered to hear, and finally do all such matters and things thereon as might or could be done at any regular Session of said court of common pleas at their terms appointed by the act to which this a suppliment

SEC. 2. Be it further enacted, that the debts due by any person or persons at the time of his or her decease by any instrument in Writing with or without seal shall be considered and taken as debts of equal degree and by his or her executors or administrators accordingly paid as such out of the decedent's Estate and all executors and administrators, after receiving the letters of administration, shall in ninety days thereafter make return of the appraisement, and sale of such Estate as he or they, may administer upon to the clerk of the court of common pleas and at the end of nine months thereafter, they shall render to the court, their whole proceedings had thereon, or so far, as to make known to the court, whether the estate is sufficient or insolvent that he administered, or the next term after the expiration of the said nine months— And if any executor or administrator, shall pay to any creditor of said Estate any more than his proportionable part or share of said Estate the said Executor or administrator shall be liable out of his own estate, to pay the creditors of said deceased the amount, thus improperly paid. Tho' the Executor or administrator might not have known of the insolvency of said estate, nor shall he at his peril knowingly pay to any creditor more than his proportionable part or share of said estate after the expiration of one year next succeeding the date of his letters of administration or Testamentary, no executor or administrator, shall confess a Judgment to any creditor of said estate unless upon Oath so as to entitle the party to whom he confesses Judgment to any more than his Just proportion of said estate, nor that no executor nor administrator shall be entitled to retain of said Estate for his own debt any more than a Just proportion, with the other creditors.

SEC. 3. And be it further enacted. That where the estate of which anyone may be executor or administrator shall amount to no more than two hundred Dollars, it shall be his duty to set up five advertisements in the most public places in the county in which the said deceased died notifying the creditors of said estate, that at the next court of common pleas, he will settle with the court and require the creditors to bring in their claims properly authenticated, but should the estate amount to more than two hundred Dollars the executor or administrator shall insert the notice of such intended Settlement in some public newspaper for eight successive weeks, & set up advertisements for the purpose aforesaid.

SEC. 4. Be it further enacted that where the estate of any deceased person does not amount to any more than two hundred dollars. The Executor or administrator who administers on said Estate shall not be entitled to any more fees than ten per cent for his trouble and all above two hundred dollars five per cent. And where the estate amounts to no more than five hundred Dollars the administrator shall not be entitled to any more fees than Seven per cent for his trouble as administrator of said Estate— And all above five hundred Dollars to one thousand Dollars three per cent— And when any estate does not amount to any more than one thousand dollars the administrator shall not be entitled to any more fees for his trouble than five per cent, and all above one thousand to two thousand dollars three per cent— And where any estate does not amount to any more than two thousand dollars the administrator shall not be entitled to any more fees for his trouble than four percent, and all sums above two thousand Dollars two and a half per cent. And in any case where the Judges of the courts of common pleas should be of opinion that the per cent allowed by this law for the trouble of settling estates should be too much, the said Judges may make any reasonable deduction as they may think Just and reasonable And where estates have become insolvent it is always to be understood that all funeral expences shall be first paid. That nothing in this act contained shall be so construed so as in anywise to affect any administration granted before the passage of this act. This act to be in force from the passage thereof.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved Dec 10. 1813

NINIAN EDWARDS

AN ACT Repealing part of an act Regulating the fees of the Several officers and persons there in named.

Be it enacted by Legislative Council and house of Representatives of the Illinois Territory and it is hereby enacted by the authority of the same, That so much of the act regulating the fees of the several officers and persons therein named, passed by the General assembly of the Indiana Territory on the seventeenth day of September 1807, as relates to the attorney prosecuting the pleas of the United States and allowing the prosecuting attorney five Dollars for every indictment or information for the whole prosecution shall be and the same is hereby repealed. This act to be in force from the passage thereof.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved Dec 10. 1813

NINIAN EDWARDS

AN ACT for the relief of the Sheriff of Randolph County

Whereas it is represented by the Sheriff of Randolph County that some misunderstanding, owing to miscarriage of letters to and from his deputy in Galletin County had occasioned a delinquency on his part in the collection of the county tax for the year 1812 in said County for remedy whereof, Be it enacted by the Legislative Council and house of Representatives of the Illinois Territory and it is hereby enacted by the authority of the same. That the said Sheriff shall be and he is hereby, allowed a further time of Five months to make and complete the collection of the aforesaid county tax for the year 1812 in the same manner as directed by the act entitled "An act for the relief of the sheriffs of Randolph and St Clair Counties" and as if the division of Randolph County had not taken place. This act to be in force from the passage thereof.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved Dec. 10. 1813

NINIAN EDWARDS

AN ACT for levying and collecting an additional Revenue and to amend the the act for levying and collecting a Tax on land.

SEC. 1. Be it enacted by the Legislative Council & House of Representatives of the Illinois Territory and it is hereby enacted by the authority of the same That there shall be annually levied and collected from each free male inhabitant above the age of twenty one years in this Territory who does not pay an annual Land tax to the Territory a tax of fifty cents each which shall be collected and paid into the Territorial Treasury in the manner hereinafter directed.

SEC. 2. Be it further enacted. That it shall be the duty of the county Commissioner in each county in this Territory annually at the time he is required by law to take in a list of county levies to take in also a list of all free male inhabitants in his county who does not pay a land tax to the Territory which List he shall return to the clerk of the court of common pleas of his county at the same time he is required by law to return a list of land and for which service the said commissioners shall be allowed the sum of two Dollars per day to be paid out of the Territorial Treasury on his producing to the auditor a certificate from the court of common pleas of his county that he has performed the duty required of him under this act. But no such commissioner shall charge the county and Territory for the same days service.

SEC. 3. Be it further enacted. That it shall be the duty of the clerk of the court of common pleas in each county to make one copy of the commissioners List which he shall deliver to the sheriff of his county at the same time which he is required by law to deliver a list of lands for taxation and shall in like manner return the Original List to the auditors office at the time he returns a list of lands, for which service the Clerk shall be entitled to receive from the Territorial Treasury on the warrant of the auditor the sum of five Dollars.

SEC. 4. Be it further enacted, that it shall be the duty of the Sheriff in each county on receiving the list as aforesaid, to demand and collect from each person named in the list the Tax aforesaid, and should any person after the tax aforesaid shall be demanded from him fail or refuse to pay the same it shall and may be lawfull for the sheriff to proceed and seize such delinquents property and sell the same in the manner he is required by law with respect to county levies

SEC. 5. Be it further enacted that the sheriff of each County shall complete his collection of taxes under this act and account for the same

and pay the amount collected into the Territorial Treasury on or before the first day of November annually and shall be credited by the auditor for all delinquencies which he shall return a list of on oath and for collecting and accounting for the tax aforesaid the sheriff shall be allowed by the auditor the sum of seven and one half percent on the amount collected and in case any sheriff, clerk, or commissioner shall fail in performing the duties required by this act they shall be proceeded against in the same manner and shall incur the same penalties as are provided by law for collection of tax on land

SEC. 6. Be it further enacted That whenever hereafter the sheriff of any county in this Territory shall receive a certified list of lands for taxation from the clerk of the court of common pleas of his county pursuant to the directions of the act to which this is an amendment the sheriff shall have until the first day of July following to demand of the several persons charged with taxes in such List, the amount due from him, her, or them, respectively any thing in the said act to the contrary notwithstanding

SEC. 7. Be it further enacted that until there shall be a public Newspaper printed in this Territory the sheriff of any county may publish any notice required by law to be given in a public Newspaper of the sale of any delinquents lands for the taxes and costs in any newspaper printed in any adjoining state or Territory any thing in the said act to the contrary notwithstanding.

SEC. 8. Be it further enacted. That in all cases in which the tax upon land imposed by the law of last session of the Legislature has not been collected all sheriffs authorised to collect the same shall proceed hereafter to advertise and collect the same in the same manner as such sheriff or sheriffs might or could have done during the present year according to the existing law, being hereby authorised to advertise the same according to the provisions of the present law— And shall make settlement with the auditor of public accounts on or before the first day of March next.

SEC. 9. Be it further enacted, That where any tract of land shall be hereafter sold for the taxes and costs, the purchaser or purchasers shall be charged with the taxes which may be thereafter due on any such tract or tracts of Land notwithstanding the time of redemption shall not have expired and in case any such tract of land shall be redeemed by the former Owner as provided by law after there shall have been a subsequent tax due thereon, the former owner or owners

shall at the time of paying to the auditor or clerk the redemption money also pay the amount of such subsequent tax or taxes before he or they shall be entitled to a certificate of redemption as provided in said act, This act shall commence and be in force from & after the passage thereof.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved Dec 11. 1813

NINIAN EDWARDS

AN ACT to make appropriations for the ensuing year and for other purposes.

SEC. 1. Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory. That the sum of one hundred dollars is hereby appropriated to defray contingent expences for the year 1814, and that all monies which may be received into the Territorial Treasury during the year 1814 except as above appropriated for contingent expences shall be a general fund for all monies allowed by law. The said sum of one hundred dollars allowed for contingent expenses shall be subject to the orders of the Governor on the Auditor for the payment of expenses and allowances which may be necessary and unforeseen and unprovided for by the Legislature. And for distributing the laws. A statement of which shall be laid by the Governor and Auditor before the Legislature at its next session

SEC. 2. Be it further enacted. That there shall be paid out of the Territorial Treasury on the warrant of the Auditor to each member of the Legislative Council and House of Representatives the sum of two dollars and fifty cents per day for each days attendance at the present session of the Legislature and at the rate of two dollars and fifty cents for every twenty miles travel to and from the seat of Government to their places of Residence by the most usual road, to the Secretary of the Legislative Council and to the Clerk of the House of Representatives for their services at the present session the sum of three Dollars & fifty cents per day each, and to enrolling and engrossing clerk the sum of three Dollars and fifty cents per day, and to the Door Keeper of Both Houses the sum of two Dollars per day for every days attendance at the present session.

SEC. 3. Be it further enacted that the compensation which may be due to the members & officers of the Legislative Council shall be certified, by the president thereof, and those that may be due to the members and officers of the House of Representatives including the enrolling and engrossing clerk & door keeper shall be certified by the speaker thereof which certificate shall be sufficient evidence to the auditor of the claim and he shall thereupon issue to such person so entitled a warrant or warrants on the Territorial Treasury for the amount of his certificate which warrants shall bear interest from the date thereof until paid at the Treasury.

SEC. 4. Be it further enacted that the following shall continue for one year commencing the first day of January next to be the salaries of certain officers as follows (towit). For the attorney General one hundred Dollars. For the auditor of public accounts one hundred & fifty Dollars for the public Treasurer one hundred Dollars. For the adjutant General. The sum of one hundred Dollars

SEC. 5. Be it further enacted that there shall be allowed and paid out of the General fund, to the following persons, the following sums of money. viz To John Hague for certain repairs done to the Court House of Randolph County for the use of the Legislature at the present session fifteen Dollars. To Ira Manville for Hauling a stove for the use of the Legislature at the present session. two Dollars To Michael Jones Register of the Land office for the District of Kaskaskia for making an abstract of confirmed claims to land for the auditor pursuant to a law of last session of the Legislature one Hundred Dollars To Jean Bte. Chamberlain for fire wood furnish'ed for the use of the Legislature at the present session nine Dollars and Seventy five cents. To Pierre Menard for plank furnished for making repairs for the court house for the use of the Legislature and for two tin pitchers for the use of the same ten Dollars forty cents to Wm. Arundel for stationary furnished for the use of the Legislature at the present session ten Dollars twenty five cents, to William Arundel Recorder of Randolph County, for his trouble in removing the antient records and papers into the secretary's office and making a list thereof agreeably to a law of the last session thirty two Dollars. To Benjamin Stephenson sheriff of Randolph County one Hundred Dollars, and To John Hays sheriff of St. Clair County seventy five Dollars, for their services in taking in a list or enumeration of the free white male inhabitants in their counties pursuant to the proclamation of the Governor

in the year 1812, To William C Greenup clerk of the House of Representatives for making a copy of the Laws pass'd at the last session with marginal notes for the purpose of being printed twenty Dollars, To John Thomas Territorial Treasurer for Books and Stationary furnished for his office eleven Dollars to Hugh H Maxwell auditor of Public accounts for a Book & Stationary furnished for the use of his office six Dollars & fifty cents For printing the laws of this session one hundred and fifty Dollars

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved Dec 11. 1813

NINIAN EDWARDS

AN ACT supplemental to an act entitled "An act Regulating Elections

Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory. That whenever hereafter any person shall at any General Election be elected a member of the House of Representatives of the Legislative Council or a Delegate to Congress The Term of his Service shall commence on the tenth day of October next ensuing his Election and such persons so elected to the House of Representatives, to the Legislative Council, and a Delegate to Congress shall continue in office from the said tenth day of October next ensuing his Election for their respective Terms as fixed by Law.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved Dec 11. 1813

NINIAN EDWARDS

AN ACT concerning the Town of Kaskaskia.

SEC. 1. Be it enacted by the Legislative Council and House of Representatives and it is hereby enacted by the authority of the same. That an election shall be held at the court House in the Town of Kaskaskia on the first day of March next for three commissioners in

which every free white male inhabitant of said Town above the age of twenty one years shall be allowed a vote. The said election shall be superintended by a Justice of the peace who shall return to the next succeeding court of common pleas for the County of Randolph the aggregate amount of votes for three successfull commissioners which shall be admitted to record. Whereupon the said commissioners shall be authorised to lay out the streets for the Town of Kaskaskia. Provided however that no Building or other improvements shall be affected thereby without the consent of the Owner or Occupier thereof and provided that they shall be governed as near as may be (with the above exception) by the existing plan of said Town after which they shall make a plat of said streets and exhibit thereon the relative situation of the residents of said town which shall be presented as soon as may be to the court of common who shall thereupon confirm and establish said Town and have the plat thereof recorded.

SEC. 2. Be it further enacted, that each and every individual having a claim or title to any lot or lots or claiming and occupying any lot or lots in said Town shall upon application to the court of common pleas, (having given thirty days previous notice at the court house doors, of his intended application and have his or their said lot or lots condemned by said court as a part of the Town aforesaid, upon his, her, or their giving bond with security to be approved by said court to pay to any person or persons who may thereafter establish a better claim to said lot or lots, the value of said Lot or lotts at the time of its or their condemnation considering the same as unimproved. Provided however that nothing herein shall be construed to affect the right of persons, who have both made improvements on the same lott or lots or who have adverse claims to the same improvements arising subsequent to the making of said improvements— But in all cases where the improvements have been made by any individual, or the person under whom he, or she claims such individuals having their lots condemned shall be liable to pay to an adverse claimant with a better title the value of the lots considered in their unimproved state at the time of the condemnation thereof.

SEC. 3. Be it further enacted that the court of Common pleas for the county aforesaid shall allow the said commissioners a reasonable compensation for their Services which said sum shall be collected of the inhabitants of said Town by an apportionment to be made

amongst them by the said court which apportionment the said court is hereby authorised and empowered to make.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved Dec 11. 1813

NINIAN EDWARDS

AN ACT establishing the boundary lines of Galletin County

Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory and it is hereby enacted by the authority of the same That the line of Galletin County do begin at the mouth of Lusks Creek on the Ohio River running up with said creek to miles's old Trace, Thence along said Trace to the meridian Line which runs north from the mouth of the Ohio river, Thence north with said line to the lower line of Madison County, Thence with said line to the dividing line between Illinois & Indiana Territories and thence with said line to the mouth of the Wabash, & thence down the Ohio to the Beginning— This act to commence and be in force from and after the Passage thereof

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved Dec 11. 1813

NINIAN EDWARDS

AN ACT Establishing the boundary line between the counties of Randolph & St Clair

Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory and it is hereby enacted by the authority of the same. That the Boundary line, between St. Clair Randolph & Galletin Counties shall begin at the Mississippi river on the line between Townships 3. & 4 south of the Base line (which is near Cahokia) Thence running east along said line between Townships 3. & 4. aforesaid to the meridian line which runs north from the mouth of the Ohio river, Thence along said meridian line until it

intersects, the Lower (or southern Boundary of the county of Madison) This act to be in force from the passage thereof.

GEO FISHER

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved Dec 11. 1813

NINIAN EDWARDS

Resolved by the Legislative Council and House of Representatives of the Illinois Territory, That the legislature agree to the proposals made by Matthew Duncan to both Houses on this day, for printing the laws of this session and that whensoever the said work shall be compleated the clerk of the House of Representatives, shall transmit to the Auditor of public accounts, a copy of said proposals whereupon it shall be the duty of said Auditor, to audit & settle the account of the said Duncan, for the work aforesaid which shall be paid out of any money in the Treasury— 11th Decemr. 1813

GEO FISHER

Speaker of the House of Repra

PIERRE MENARD

president of The Council

Approved Dec 11. 1813

NINIAN EDWARDS

UNITED STATES OF AMERICA,

STATE OF ILLINOIS.

} ss.

Office of the
Secretary
of State.

I, Louis L. Emmerson, Secretary of State of the State of Illinois, do hereby certify that the foregoing Acts and Joint Resolution of the Second General Assembly of the Illinois Territory, passed and adopted at the regular session thereof, held in the year A. D. 1813, are true and correct copies of the original Acts and Joint Resolution now on file in the office of the Secretary of State.

IN WITNESS WHEREOF, I hereto set my hand and affix the Great Seal of the State of Illinois, at the city of Springfield, this 9th day of July, A. D. 1920.

LOUIS L. EMMERSON,

Secretary of State.

[SEAL]

L A W S
AND
JOINT RESOLUTIONS
PASSED
BY
THE LEGISLATIVE COUNCIL
AND
HOUSE OF REPRESENTATIVES
OF
ILLINOIS TERRITORY
AT
THEIR THIRD SESSION
HELD
AT KASKASKIA
IN 1814

(From the first complete printing made from the original records by
The Chipman Law Publishing Company, 1921.)

A LIST OF LAWS

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STATE OF ILLINOIS } Office of the
Secretary
of State.

I, Louis L. Emmerson, Secretary of State of the State of Illinois, do hereby certify that the following and hereto attached is a true copy of the Territorial Laws of 1814, the original of which is now on file and a matter of record in this office.

IN TESTIMONY WHEREOF, I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois, Done at the City of Springfield this 6th day of December A. D. 1920.

LOUIS L. EMMERSON,
Secretary of State.

[SEAL]

LAWS OF ILLINOIS TERRITORY

Enacted in 1814

*AN ACT for the relief of the legal representatives of
Alexander Wilson deceased.*

Whereas it appears to this Legislature that William H. Harrison Esquire during the time he acted as Governor in and over the Indiana Territory and as superintendent of the United States' Saline within the same while this Territory was and integral part of that, did grant a permission to a certain individual to occupy and keep a public ferry at the place now called Shawanoe Town which said permission being unrevoked after the erection of this Territory into a separate Government was with all the privileges, & subject to all the conditions appertaining thereto, purchased by Alexander Wilson deceased for a large sum of money which was paid and Satisfied by said Wilson, who also before the establishment of Gallatin County obtained an order of from the Court of Randolph County establishing and granting said ferry to himself which he continued to hold, occupy and use as such until his death, and which has since been so held occupied and used by his legal representatives. And Whereas doubts have arisen to the legality of the establishment of said ferry or the right of the legal representatives to hold the same in consequence of the margin of the Ohio River at Shawanoe Town where said ferry was established being according to the plan of said Town public ground and unappropriated to any individual. For remedy whereof and to settle all disputes relative thereto

SEC. 1. Be it enacted by the Legislative Council and house of Representatives and it is hereby enacted by the authority of the same that the aforesaid ferry on the Ohio river at Shawanoe Town shall be and hereby is confirmed to the legal representatives of said Alexander Wilson deceased, with all the emoluments, advantages, privileges, that can be granted to any individual under the existing laws relative to ferries, but nevertheless it shall be subject in the hands of said representatives to all the rules, regulations and penalties to which ferries legally established by courts are subject. This act shall take

effect and continue in force from and after the passage thereof.

RISDON MOORE

Speaker of the House of Representatives

BENJAMIN TABLOTT

President Pro tem L C Council

Approved Nov 28, 1814

NINIAN EDWARDS

AN ACT for the division of Galletin County.

Section 1. Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory and it is hereby enacted by the authority of the same, That all that tract of Country within the following boundaries (towit) Beginning at the mouth of Bompast Creek on the big Wabash, and running thence due west to the Meridian line which runs north from the mouth of the Ohio River. Thence with said Meridian line and due North 'till it strikes the line of upper Canada, Thence with the line of upper Canada to the line that separates this Territory from the Indiana Territory and thence with the said dividing line to the beginning shall constitute a separate county to be called Edwards and the seat of Justice for said county shall be at the Town now called Palmyra on the Wabash provided the proprietor or proprietors of said land shall give to the said county for the purpose of erecting the public Buildings a quantity of land at said place not less than twenty acres to be laid off into lots and sold for the above purpose. But should said proprietor or proprietors refuse or neglect to make the donation aforesaid then and in that case it shall be the duty of the Court of Common pleas who shall be appointed for said county to fix upon some other place for the seat of Justice as convenient as may be to the different settlements in said county.

Section 2. Be it further enacted that the Court of Common pleas shall set in said county at the following periods (towit) The courts for civil and criminal business on the fourth Mondays of March July and November yearly and every year, and the three other courts shall be holden on the fourth Mondays of January May and September yearly and every year.

Section 3. Be it further enacted that it shall and may be lawful for the Governor of this Territory immediately to constitute the militia within the county thus laid off into one Battalion the commanding officer of which shall have the same power to order out the

militia as is now possessed by the Lieutenant Colonels of the respective Regiments.

Section 4. And be it further enacted that the said county of Edwards is hereby allowed one Representative in the House of Representatives of this Territory who shall be elected agreeably to law and be entitled to all the immunities, powers & privileges prescribed by law to members of the house of Representatives. And whereas the next general election for representatives to the Legislature will not take place before the month of September in the year 1816 and in consequence thereof the said county will be unrepresented in the house of Representatives until that time, for remedy whereof, An election is hereby directed to be held at the seat of Justice for said county on the first Thursday in March next and continue open three days and to be conducted in all other respects, by the persons and in the manner prescribed by law at which said election the persons entitled to vote may elect a representative to the house of Representatives who shall continue in office until the 10th day of October 1816 and shall during his continuance in office be bound to perform the same duties and entitled to the same privileges and immunities that are prescribed by law to a member of the House of Representatives.

Section 5. Be it further enacted, That Whereas the counties of Gallatin and Edwards compose one District for the purpose of electing a member of the Legislative Council, the citizens of said county entitled to vote may at any election for a member of the Legislative Council to represent said District, proceed to vote for such member, and it shall moreover be the duty of the Sheriff of the said County of Edwards within ten days after the close of said Election to attend at the Court House of the County of Galletin, with a statement of the votes given in said county of Edwards to compare the polls of the respective Counties, and it shall be the duty of the sheriff of Galletin County to attend at such time and place, with a statement of the votes of Galletin County and upon counting the votes of the respective counties, it shall be the duty of the said sheriff of Galletin & Edwards counties to make out and deliver to the person duly elected a certificate thereof. If the said Sheriffs or either of them shall refuse or fail to perform the duty required by this section, such delinquent, shall forfeit and pay the sum of two hundred dollars to be recovered by action of debt or Indictment one half to the use of the Territory and the other half to the person suing for the same.

Section 6. Be it further enacted that the citizens of said county of Edwards are hereby declared to be entitled in all respects to the same rights and privileges in the Election of a Delegate to Congress as well as of a member to the House of Representatives of the Territory that are allowed by law to the other counties of this Territory, and all elections are to be conducted at the same times and in the same manner, except as is excepted in this law as is provided for other counties. This act shall commence and be in force from and after the passage thereof.

RISDON MOORE

Speaker of the House of Representatives

BENJAMIN TALBOTT

President of the Council
pro tem

Approved this 28th Nov 1814

NINIAN EDWARDS

AN ACT *to repeal part of an act entitled, "an act for levying and collecting a tax on land.*

SEC. 1. Be it enacted by the Legislative Council and House of Representatives of Illinois Territory, That so much of the seventh section of an act passed at the first session of the Illinois Legislature, on the 23rd day of December 1812 entitled "an act for levying and collecting a tax on land" as relates to the forfeiture of Lands fraudulently given in to the commissioners shall be and the same is hereby repealed—

SEC. 2. Be it further enacted, That in all cases where persons either residents or non-residents shall fail to give in a list of their lands according to law such persons shall be subject to pay tripple the tax imposed on said land by law any laws or parts of laws to the contrary notwithstanding, This act to commence and be in force from and after the passage thereof.

RISDON MOORE

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved Dec 1. 1814

NINIAN EDWARDS

AN ACT *concerning the abatement of suits by the death of the parties.*

SEC. 1. Be it enacted by the Legislative Council and house of Representatives of the Illinois Territory, That whenever any writ original or subsequent process, shall be sued out of any of the Courts of this Territory and after the execution thereof the defendant or defendants shall depart this life before final judgment obtained therein, such action shall not abate if the same were originally maintainable against the executors or administrators of such defendant, but it shall be lawful for the plaintiff or plaintiffs in any such suit to have, after suggesting the death of the defendant on the record, a summons to the Executors or administrators of the deceased defendant, to come forward and make themselves defendants to the said suit, and if the said Executors or administrators shall appear at the court in obedience to the summons to enter themselves, Defendants to the action they shall be entitled to a continuance untill the next term without costs if they desire it and the suit shall then progress in all respects in the same manner as if it had been brought against them in the first instance—If the said Executors or administrators shall fail to appear and enter themselves defendants (being served with the summons as aforesaid, or any one of them being served with the summons) the plaintiff may proceed against them as in cases of default.—Provided that where Judgment is obtained under this act, no execution shall issue until one year from the date of the letters of administration.

SEC. 2. Be it further enacted, That if the plaintiff or plaintiffs in any suit after the Execution of the writ therein shall depart this life before final Judgment, such suit shall not abate provided the same were originally maintainable by the Executors or administrators of such decedant, but the executors or administrators of such decedant may have a summons to the defendants notifying him, her or them that they have entered themselves plaintiffs in said suit, and that they intend to prosecute the same; after which summons the suit shall progress to final Judgment and Execution in the same manner as if the plaintiff were living.

SEC. 3. Be it further enacted, that if there be two or more plaintiffs or defendants, and one or more die; and the cause of action survives to the plaintiff or against the Defendant living it shall not

abate, any law or parts of laws to the contrary notwithstanding. This act to be in force from its passage.

RISDON MOORE

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved Dec 1. 1814

NINIAN EDWARDS

*AN ACT for the relief of those who forfeited lands by failing to give
a list to the commissioners*

Whereas it has been represented to the General Assembly of the Illinois Territory, that the owners and possessors of Land in some instances have failed to list all their lands subject to taxation as the law directs, and the land in consequence thereof is forfeited to the use of the Territory for remedy thereof,

Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory and it is hereby enacted by the authority of the same, That in all cases, where the owner or owners of land in said Territory have omitted or neglected to list all their lands subject to taxation as the law requires, that the land so omitted or neglected to be listed, may be redeemed by the payment of tripple tax on the same. Provided the owner or owners thereof pay into the office of the auditor, the same, on or before the first day of March next, and the Auditor is hereby authorised and empowered to receive the same and to give a receipt for the same.

This act to commence and be in force from and after the passage thereof.

RISDON MOORE,

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved Dec 8. 1814

NINIAN EDWARDS

AN ACT concerning the Town of Shawanoe Town

SEC. 1. Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory, and it is hereby enacted by the authority of the same That the following persons be and they are

hereby appointed Trustees of the Town of Shawanoe Town to continue in office until the first monday in November next, and until the Election of successors as hereinafter provided, viz., Harry Oldham, Thomas E. Craig, John Marshall, George W. Frazer & Joseph M. Street.

SEC. 2. Be it further enacted that the holders of Lotts in said Town being residents thereof or being in possession of any lott or lotts, and holding a bond for conveyance, shall be & they are hereby authorised to elect five Trustees, annually on the first monday of November That it shall be the duty of the Sheriff of Galletin County to give twenty days previous notice in writing at the door of the court house of said county, that such an election will be holden, and also to superintendent and conduct the same, and may employ a clerk to assist him in keeping the poll for which services compensation shall be made by the Trustees.

SEC. 3. Be it further enacted that the Trustees shall have power to appoint a clerk to their Board, & annually to appoint an assessor whose duty it shall be to value and assess all the Lotts in said Town and make return thereof to the Trustees having previously taken an oath before some Justice of the peace, truly and impartially to perform the same, but in the valuation of said lots the Houses and other improvements erected thereon shall not be taken into consideration.

SEC. 4. Be it further enacted that upon the return of such list of Taxable property by the assessors the Trustees shall levy a tax thereon at a rate not exceeding two percentum per annum on the valuation of said lots, for surveying the Town, paying the expence of their offices and cleaning and keeping in repair, the streets and such other improvements as may be deemed expedient & necessary by the Board of Trustees.

SEC. 5. Be it further enacted That it shall be the duty of the Board of Trustees annually after the assessment shall have been made as aforesaid to appoint a collector who shall before he enters on the duties of his office give bond and security to the Trustees or a majority of them in double the sum to be collected, conditioned for the faithful collection and accounting for the same according to law. The said collector shall be by sale of the Lotts or otherwise, collect and account with the Trustees, for the amount of the taxes put into his hands for collection, within three months from the time of the list of assessment being put into his hands for collection. For the collecting of the said

Taxes the Trustees shall allow the said collector six per cent on the amount collected. The said collector shall make personal application to the person or persons charged with the tax in the list of assessment if they be residents of the said Town before he shall expose to sale any lot or other property to make the amount of the tax due from such inhabitant and if the amount be not paid to the collector within one month after such application, It shall & may be lawful, for the collector to seize any personal property of any such delinquent which he may find in said Town, and after having given ten days previous notice in writing at some public place in said Town to make sale thereof or so much as will pay the tax and costs of keeping the property; and in case the collector cannot find any property whereof he can make the taxes due from any person, charged, with the taxes aforesaid It shall and may be lawful for the collector, to sell the whole or so much of each lot at public sale, after having given twenty days previous notice in writing in three of the most public places in said Town as will pay the tax due thereon, and shall give the purchaser or purchasers a certificate thereof which shall vest the title completely in whose name soever the same may be sold, unless the same be redeemed by the owner by paying to the purchaser within twelve months after such sale the amount of the purchase money with twenty-five per cent thereon.

SEC. 6. Be it further enacted That on the death resignation or removal of anyone or more of the Trustess, the vacancy shall be filled by the remaining Trustees who shall appoint a successor or successors to continue in office until the next Election and in case there should not be an election held for Trustees at the time appointed by this act the last Trustees in office shall continue in office until the next annual election.

SEC. 7. Be it further enacted That the Trustees of the said Town or a majority of them shall have power and authority to make such Bye-laws, rules and ordinances for the good regulation of the said Town as shall to them seem meet (if not inconsistent with the laws of this Territory, nor the ordinance) and cause the same to be published in the most public places in said Town from time to time for the information of the citizens thereof and it shall be the duty of the said Trustees to procure some convenient piece of ground and cause the same to be enclosed for a public burying ground. And it shall moreover be the duty of said Trustees to cause the said Town to be sur-

veyed, and a plan thereof recorded in the Recorder's office of Galletin County, and may provide for affixing posts or stones at the corner of each square or lot to perpetuate the same, and may appoint one or more of the Trustees to superintend the surveying the same.

SEC. 8. Be it further enacted, That any three of the Trustees may and shall be sufficient to constitute a Board. This act to be in force from and after the passage thereof.

RISDON MOORE

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved Dec. 8th 1814

NINIAN EDWARDS

AN ACT *concerning executions.*

SEC. 1. Be it enacted by the Legislative Council and House of Represntatives of the Illinois Territory, and it is hereby enacted by the authority of the same, That all writs of execution that may be hereafter issued from the clerks of the General Court or any court of Common Pleas shall be made returnable within thirty days from the date thereof if directed to the sheriff of the county in which the execution issued but if directed to a different county from that in which the execution issued then and in that case it shall be made returnable in forty days from the date thereof.

SEC. 2. Be it further enacted that it shall be the duty of all sheriffs of the respective counties within this Territory when he shall receive an execution to endorse on the back thereof the day and hour when he received it, and it shall bind the personal Estate of the defendant or defendants which may then be in the county to which the execution is directed, from the date of the endorsement threon as aforsaid made.

SEC. 3. Be it further enacted, That any sheriff who shall fail to comply with the duty imposed on him by the second Section of this act shall forfeit and pay the sum of one hundred dollars, for every such neglect of his duty, by an action of debt, indictment or presentment, one-half to the informer, and the other half to the Territory, and he shall moreover be liable to the party injured for such damages as he may sustain thereby.

SEC. 4. Be it further enacted that if it appears from the

return of a Fieri facias, that the defendant or defendants have not goods or chattels lands, or tenements sufficient to satisfy said execution in the county in which the Judgment was rendered the Plaintiff may immediately sue out another execution on said Judgment, and have it directed to any county in the Territory he may think proper.

SEC. 5. Be it further enacted that on all Judgments now entered or hereafter to be entered on any mortgage in this Territory and the mortgaged premises sold on a writ of Levari facias shall not bring the sum for which Judgment and costs were entered, it shall and may then be lawful for the plaintiff after the return of said levavi facias and the sale of the said mortgaged property to issue other executions against the person or estate of said defendant, for the recovery of the sum remaining due on said judgment as in other cases. This act shall commence and be in force from and after the first day of January next.

RISDON MOORE

Speaker of the Houses of Representatives

BENJAMIN TALBOTT

President of the Council

Approved Dec 9. 1814

Protém

NINIAN EDWARDS

*AN ACT establishing a supreme Court for Illinois Territory.**

SEC. 1. Be it enacted by the Legislative Council and house of Representatives, and it is hereby enacted by the authority of the same. That the Judges appointed for this Territory under the authority of the Government of the United States shall constitute a court to be styled the "Supreme Court of Illinois Territory" which shall be holden in the same manner and at the times and places hereinafter mentioned that is to say in the county of Edwards on the second monday in February and fourth monday in July. In Galletin, third monday in February and first monday in August. In Johnson fourth monday in February, and second Monday in August. In Randolph the first monday in March, and third monday in August. In St Clair third monday in March and first monday in September.

* This law is published here in its chronological order although in the Chipman edition it followed "An Act to make appropriations for the ensuing year."

In Madison the fourth monday in March and second monday in September, Yearly and in every year.

SEC. 2. Be it enacted by the authority aforesaid, That the said courts shall be holden at the respective court houses of said Counties, and shall in each county have Jurisdiction over all persons therein, and in all causes, matters or things at common Law or in chancery—arising in each of said counties, except in cases where the debt or demand shall be under twenty dollars in which cases it shall have no Jurisdiction except where the same shall be brought before it by appeal or writ of error.

SEC. 3. The said Judges shall be conservators of the peace, and the said court or any Judge thereof shall have power to award injunctions, writs of ne exeat, habeas corpus, and all other, writs and process that may be necessary to the execution of the power with which they are or may be vested.

SEC. 4. The said court shall have power to hear and determine all Treasons, felonies, and other crimes, and misdemeanors that may be committed within the respective Counties aforesaid that may be brought before it by any rules or regulations prescribed by law.

SEC. 5. The said court shall have Jurisdiction in all causes, suits and motions against public debtors, sheriffs, clerks, and all collectors of public money of every denomination whatsoever, for & in behalf of the Territory of any county thereof—and in all cases where it may have been the duty of any sheriff, clerk, or collector of public money to have made collections, and have settled with the proper authority, and he or they shall have failed to have done so, or shall hereafter fail so to do. And there shall appear any defect in the Bond given by said officers or other proceeding, sufficient to exempt from liability the Security or Securities of said officer, or to defeat the ordinary proceedings against himself the court shall have power to compel such person whether in or out of office who either has collected public money or ought to have done so, to exhibit upon oath a full and fair statement of all monies by him collected and a list of all persons as far as it may be practicable to obtain the same of whom such person had a right to collect and who had failed to pay him accordingly and the said court shall upon hearing the whole case without regard to form have power to give Judgment for such sums of money which such person or persons as aforesaid ought to be liable to pay according to the true spirit of the Laws and the principles of

Equity. Provided however that such person or persons as aforesaid shall have reasonable notice of the time and place when and where a motion to the court against him or them for the purposes aforesaid is intended to be made.

SEC. 6. All the powers at present vested in the General Court, and all the Common Law Jurisdiction, whether of a civil or criminal nature now vested in the several courts of common Pleas, not inconsistent with the principles of this law, shall be and hereby are vested in the Supreme Court hereby established, and the rules and regulations prescribed by law for the exercise of those Powers in all cases whenever the same may be applicable shall govern said Court and be pursued by parties litigant therein and in all cases not provided for by law, the said court shall have power to adopt rules and regulations necessary for effectuating the powers hereby granted to it.

SEC. 7. All suits shall be tried in the counties in which they originate, unless in cases that are or may be otherwise specially provided for by law and in all cases except those hereinafter mentioned—One of the Judges shall be sufficient to constitute a court.

SEC. 8. In all criminal cases where the charge shall be of such a nature as in case of conviction to subject the offender to capital punishment or burning in the hand or elsewhere two Judges shall be necessary to proceed upon the trial of the issue whether in law or fact Provided however that if only one Judge shall attend the court, and any prisoner shall notwithstanding petition to be brought to trial, one Judge shall constitute a court for such purpose. When two Judges shall attend, all questions arising in criminal cases and submitted to the court, in case the court shall be divided, shall be considered as adjudged in favour of the criminal, and if the court shall be divided in the final Judgment or sentence, Judgment shall be entered up in favour of the prisoner and he forthwith discharged.

SEC. 9. If no Judge shall attend on the first day of any court, such court shall stand adjourned from day to day until a court shall be made if that shall happen before four of the clock in the afternoon of the third day.

SEC. 10. If a court shall not sit in any term, or shall not continue to sit the whole term or before the end of the term shall not have heard and determined all matters ready for their decision all such matters and things depending in court and undetermined shall stand continued 'till the next succeeding term.

SEC. 11. If from any cause the court shall not set on any day in a term after it shall have been opened, there shall be no discontinuance, but so soon as the cause is removed the court shall proceed to business until the end of the term, if the business depending before it be not sooner dispatched.

SEC. 12. The Judicial term shall consist of six days in each county during which time the court shall set unless the business before it shall be sooner determined except in Randolph County where it may set twelve days.

SEC. 13. A clerk shall be appointed by the Governor of the Territory in each county whose duty it shall be to issue process in all cases originating in his county; to Keep and preserve the records of all the proceedings of the court therein and to do and perform in his county all the duties now enjoined on the Clerk of the General Court, and the several clerks of the Courts of Common please, except those which relate exclusively to county business of which the court hereby established has no original Jurisdiction.

SEC. 14. Whensoever the Governor shall appoint a clerk as afore-said it shall be his duty if any court of common pleas shall have been established in the county to demand of the clerk of said court of Common Pleas therein all the books and papers in his possession except those which relate to county business of which the court hereby established has no Jurisdiction, and such clerk of the court of Common pleas shall thereupon deliver the same under the penalty of one thousand dollars to be recovered by action of debt in behalf of the Territory.

SEC. 15. In the causes now depending in the courts of common pleas in the respective counties, the parties or their attorneys shall be permitted to take all such measures for bringing to trial that might have been taken if no change had taken place and the court hereby established as far as possible proceed to the trial thereof in the same manner that the present courts of common pleas might legally have done had no other change than a mere alteration of the term taken place, it being distinctly the intention of this Legislature to produce no other change upon the causes now depending in those courts of common pleas than merely to substitute the present for the former courts. If however any causes requiring particular indulgence should present themselves, the court are hereby empowered to grant continuances for remedy thereof.

SEC. 16. Appeals may be prayed and writs of error taken out upon matters of law only in all cases wherein they are now allowed by law. Appeals shall be taken to the court to be holden in Randolph County and all writs of error shall be issued by the clerk of Randolph county and be made returnable to the court in that county. But no question upon appeal or writ or error shall be decided without the concurrence of two Judges at least. And it being as important that the exposition given by the Judges to a law should be made public as that the law itself should be.—it is hereby declared to be the duty of each Judge in all cases of appeals or writ of error to state the case and give his reasons at large in writing for his opinion which shall be carefully preserved by the clerk and kept subject to the inspection of all who may desire to read the same.

SEC. 17. Nothing in this law contained shall be construed into a repeal of the existing regulations for speedy trial of persons charged with capital offences, but the Judges of the supreme court hereby established shall perform the same duties in that respect that were hitherto prescribed to them as Judges of the General Court.

SEC. 18. The Courts of Common pleas for the several counties, shall not hereafter possess or exercise any Jurisdiction given to the Supreme Court of Illinois Territory.

SEC. 19. The sheriffs of the respective counties shall summon Juries, and return in their respective counties, all process to them directed to the Supreme Court in the same manner that, they have heretofore been required to do to the courts of Common Pleas unless in cases where the law shall specially prescribe otherwise

SEC. 20. There shall be appointed two attorneys to prosecute in all cases in behalf of the Territory, one of which shall be appointed to a district to be composed of the counties of Madison, St Clair and Randolph. And the other shall be appointed to a district to be composed of the counties of Johnson, Galletin & Edwards And each of said attorneys shall prosecute in all cases according to law, that may arise within his respective district, and each shall be allowed a salary of one hundred dollars per annum to be paid out of the public Treasury.

SEC. 21. Be it further enacted that all Sheriffs and clerks of courts in the respective counties shall within six months from the passage hereof remove their respective offices and all the papers and records thereunto belonging to the seat of Justice of their respective

Counties, and they shall continue to keep their respective offices, and all the books and papers thereunto appertaining at said Respective seats of Justice in their respective counties, under the penalty of five hundred dollars to be recovered by motion giving the party twenty days previous notice thereof in writing, in any court having Jurisdiction of the same, one half to the informer and the other half to the use of the said county. This act to commence and be in force from and after the first day of January next.

RISDON MOORE

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved this 13th Decr 1814

NINIAN EDWARDS

AN ACT concerning the Militia.

SEC. 1. Be it enacted by the Legislative Council and House of Representatives and it is hereby enacted by the authority of the same That whensoever any draft of the Militia shall be ordered within any regiment, the Governor of the Territory is hereby empowered to direct that a court martial shall meet at the place which may be appointed in said regiment for the rendezvous two days before the time appointed for such rendezvous, which said court shall set until the expiration of the day of Rendezvous and shall have power to hear and determine upon all excuses that may be made by any individual, within the two first days of its session for exemption from Service and in no instance shall any militiaman be exempted from Service who shall not have made his application within the time before mentioned.

SEC. 2. Whereas many persons with small hurts or injuries frequently avail themselves thereof to procure exemption from performing their tours of duty, though they be able to pursue their own private business, very expert with fire arms in hunting and other amusements, and more able than many others to employ substitutes It is hereby directed to be the duty of the aforesaid court martial to enquire diligently into those circumstances, and to refuse certificates of exemption to any person or persons that said court may believe are able to do militia duty, notwithstanding such person or persons may labour under some partial disadvantages.

SEC. 3. Where-ever any person shall fail or refuse to perform

his tour of duty without reasonable excuse made within the time aforesaid, unless he shall be able to show that he had a sufficient excuse, and that it was not in his power to attend within the time and at the place hereby required to make the same it shall be the duty of said court martial to give Judgment against such delinquent in any sum not more than sixty dollars per month for the time he may be required to serve, nor less than thirty dollars for each month and it shall be the duty of the Judge advocate, to transmit a certified copy of all fines thus assessed by any court martial to the Sheriff of the county together with the warrant of said court, and also a certified copy of said fine to the auditor of public accounts who who [*sic*] shall charge the said sheriff therewith as in the case of Territorial Taxes which said certificate, shall be transmitted by the Judge advocate to the sheriff and auditor within twenty days from the assessments of said fine, and the sheriff shall collect the same within sixty days from the time he received the warrant of said court martial and pay the same into the public Treasury giving ten days notice of the sale of the delinquents property, and any Judge advocate or sheriff failing to perform the duties herein required shall forfeit and pay double the amount of the fine imposed by this law.

SEC. 4. All and every officer who shall be appointed to compose any court martial and failing to do so shall pay the sum of (Towit,) a captain (or any officer of higher grade) not more than fifty dollars, nor less than Ten dollars—All officers under the Rank of Captain, failing as aforesaid shall for every such offence pay a sum not more than thirty dollars nor less than six dollars to be recovered in the same manner as is hereinbefore directed.

SEC. 5. The Adjutant shall for summoning, and for attending any Court Martial as a compensation for his services herein receive the sum of two dollars per day for each and every day's service for which he shall obtain a certificate from the Court martial to the auditor of Public accounts, who shall give him a warrant to the Territorial Treasurer for the amount thereof, and all sheriffs for levying and collecting all and every fine imposed by this act shall be allowed the same compensation as for collecting the Territorial Tax.

SEC. 6. The Judge advocate, for his services rendered at any Court Martial as aforesaid shall receive the sum of three dollars for each day he may serve therein, who shall for his services as aforesaid obtain from said Court martial a certificate thereof to the auditor

of public accounts, who is hereby required to give him a warrant for the Territorial Treasurer for the same.

SEC. 7. The said court martial may be adjourned from day to day until every case of delinquency shall have been decided or may be convened at any time by the Governor, for the purpose of deciding upon those cases of delinquency, though no adjournment may have been entered on their proceedings.

SEC. 8. If the Governor of the Territory should be unable or should fail to require the attendance of a court martial as aforesaid for the purposes aforesaid. The powers hereby given to him in that particular shall be exercised by the Lieutenant Coloney of the Regiment, or the commanding officer of the department in which a draft may be ordered.

SEC. 9. If any person drafted to perform a tour of duty shall be able within the time specified for that purpose to exhibit to the aforesaid court a reasonable ground for exempting such person from the performance of such Tour the said court shall give to such person a certificate thereof, which shall be sufficient to exempt him from the tour for the time being.

SEC. 10. If any person shall be legally drafted and notified to march and shall fail or refuse to do so (not having obtained a certificate of exemption from the Court aforesaid) such person shall be considered as a deserter, and it shall be lawful for any one, and shall be the particular duty of all militia officers to apprehend such person, and deliver him to any officer commanding in the detachment to which such deserter may belong.

SEC. 11. The Governor of the Territory shall be and hereby is empowered to raise and organize as many companies of mounted Riflemen in this Territory as he may deem requisite for any service that is likely to be wanting. Any officer appointed to command in any one of those companies (they being intended only for temporary purposes) shall not loose thereby any appointment he may hold in the militia. Such companies when raised and organized shall be subject to be called into Service at any moment and shall continue in Service three months after they shall reach the Rendezvous that shall be appointed for them, But if they or any one of them shall make a specific tender of their services for six months or any longer period they or any one of them so tendering their services shall be liable when called upon to perform the tour of duty so stipulated, and any person enrolled

in any one of said companies who shall fail or refuse to perform the tour of duty required, shall be subjected to the same punishment, and subject to the same coercion in every respect whatsoever as is provided in this law against persons drafted and failing or refusing to perform their tour of duty.

RISDON MOORE

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved Dec 14th 1814

NINIAN EDWARDS

AN ACT to repeal part of an act entitled "An act for levying and collecting an additional Revenue," and to amend the "act for levying and collecting a tax on land

Be it enacted by the Legislative Council and house of Representatives and it is hereby enacted by the authority of the same. That so much of the law (passed by the Legislature of this Territory on the ninth of December 1813 entitled an act for levying and collecting an additional revenue as relates to a poll tax imposed on such as do not pay an annual land tax shall be and the same is hereby repealed.

RISDON MOORE

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved Dec 14. 1812 [*sic*]

NINIAN EDWARDS

AN ACT Supplementary to an act Entitled "an act for authorising the appointment of County Commissioners and other purposes passed the 25th day of December 1812.

Be it enacted by the Legislative Council and House of Representatives and it is hereby enacted by the authority of the same. That the auditor be authorised to contract with the Registers of the Land offices of Vincennes Shawanoe Town and Kaskaskia for Transcripts therein required, for which and the other duties of him required by the aforesaid act, he shall receive a competent compensation yearly

and every year to be provided by law. Provided always that no transcript so obtained shall be included in any subsequent one.

RISDON MOORE

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved Dec 14. 1814

NINIAN EDWARDS

AN ACT concerning the Town of Kaskaskia.

SEC. 1. Be it enacted by the Legislative Council and house of Representatives and it is hereby enacted by the authority of the same That an election shall be held at the court house in the Town of Kaskaskia on the first day of March next for three Commissioners for which every free white male inhabitant of the said Town above the age of twenty-one years and owning a lott or lotts in said Town shall be allowed a vote. The said election shall be superintended by a Justice of the peace who shall return to the next succeeding Court of common pleas or county court for the county of Randolph the aggregate amount of votes for three successful commissioners which shall be admitted to record, whereupon the said commissioners shall be authorised to lay out the Streets for the Town of Kaskaskia. Provided however that no building or other improvements shall be affected thereby, without the consent of the owner or occupier thereof. And provided they shall be governed as near as may be with the above exception by the existing plan of the said Town. After which they shall make a plat of said streets and exhibit thereon the relative situations of the residents of said Town, which shall be presented as soon as may be to the Court of Common pleas or County Court who shall thereupon confirm and establish said Town and have the plat thereof recorded.

SEC. 2. Be it further enacted that each and every individual having a claim or title to any lott or lots, or claiming and occupying any lott or lotts in said Town, shall upon application to the court of common pleas or county court, having given thirty days previous, notice at the court house door of his intended application, and have his or their said Lott or Lotts condemned by said court as a part of the Town aforesaid upon his or her or their giving Bond with Security to be approved by said court to pay to any person or persons who may hereafter exhibit a better claim to said lott or lotts at the time of its

or their condemnation, considering the same as unimproved Provided however that nothing herein shall be construed to affect the right of persons who have both made improvements on the same lott or lotts, or who have adverse claims to the same improvements, arising subsequent to the making of said improvements but in all cases where the improvements have been made by any individual or the person under whom he or she claims, such individual having their lotts condemned, shall be liable to pay to an adverse claimant with a better title the value of the lots in their unimproved state at the time of the condemnation thereof.

SEC. 3. Be it further enacted That the court of common pleas or county court for the county aforesaid, shall allow the said commissioners a reasonable compensation for their services, which said sum shall be collected of the inhabitants of said Town, by an apportionment to be made amongst them, by the said court, which apportionment the said court is hereby authorised and empowered to make.

RISDON MOORE

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved Dec 15. 1814

NINIAN EDWARDS

AN ACT concerning the establishment of Towns.

SEC. 1. Be it enacted by the Legislative Council and House of Representatives of Illinois Territory, and it is hereby enacted by the authority of the same. That the county Courts in this Territory, shall be and the same are hereby vested with full power and authority in all cases within the bounds of their counties where they may seem necessary and advantageous for the same and the people at large, by an order of court to establish a Town and vest any particular tract or parcel of land in Trustees for that purpose, on application of the proprietor of the land, and the court shall on such order ascertain by metes and bounds the quantities of land that they may deem necessary for such Town, appoint the Trustees and fix the name by which it may be called, which order of court shall as effectually vest the land so allotted for a Town in such Trustees as if done by an act of the Legislature. Provided however that no application shall be made to any court for an order as aforesaid, unless notice

of such application shall have been given to the public by advertisement at the door of the court house of the county in which the land shall lie, for at least two months, and twice a month for three months successively in the "Illinois Herald" or any other public paper in this Territory previous thereto, and provided also, that no Town shall be established on any land under this act, or any land laid off in addition to any Town already established to which any person or persons sets up a claim either in law or Equity, without the consent of the adverse claimant or claimants. The land vested in Trustees as aforesaid, shall be by them or a majority of them laid off into convenient streets and lots, shall be disposed of, by them at public auction, for the best prices that can be had, either in money or property, as the proprietors of said Town may direct, having previously advertised such sale at the door of the court house two months. The said Trustees, shall take bond, with security or securities to be approved of by the proprietor, for the payment of the purchase money to the proprietor, and deliver such bond to him. The said Trustees shall convey the lots in fee-simple to the purchasers, and shall moreover have full power and authority to make such rules and regulations for the government of said Town, as shall appear necessary Provided they are not contrary to the ordinance and laws of this Territory, and shall settle and determine the bounds of all lots in said Town, & fill any vacancy that may happen, by death, resignation refusal to act or removed out of the county, of any of the Trustees, so appointed or elected as hereafter directed.

SEC. 2. And the Trustees of any Town established by this act are hereby empowered to cause the streets, of the said Town to be cleaned, and repaired by the inhabitants thereof, and if they or any of them, shall refuse to clean, or repair the part of said streets assigned them it shall be lawful for the said Trustees or a majority of them to hire the cleaning and repairing of said street and levy the price thereof on the person or persons so failing and refusing, and in case they do not make payment immediately the said Trustees are hereby authorised and empowered to recover the same before any Justice of the peace of the county with costs, and each Justice shall grant execution accordingly.

SEC. 3. When the holders of lots in any Town established agreeably to this act, and actually therein shall amount to fifteen, they shall elect Trustees of the said Town on the first court day of the first court

in every second year, and the Trustees so appointed shall have the same powers as those appointed by the court.

SEC. 4. When any person shall apply to the court of any county to have a town established under this act it shall be the duty of such court, and they are hereby directed to take bond with security in the penalty of one thousand dollars payable to the Justices of said court or their successors, from the person applying, conditioned that if any person shall hereafter establish a better title either in law or equity to the land or any part thereof on which said Town is erected, that he shall pay and account to such persons establishing the better title, for all sums of money, for which the lots or the part of them included within the bounds of such better title were sold by the Trustees, which bond may be put in suit by and at the expense of any person establishing a better title to the whole or any part of such land, from time to time until the whole of the money for which any lots included in the bounds of any such better title have been sold, shall be recovered.

SEC. 5. Where any town has been established in this Territory, and the proprietor of the land adjoining the same, shall wish to add to or enlarge said Town and having advertised the same agreeably to the direction of this act, the court of the county in which the same is established or situate on this application are hereby authorised if they deem it necessary to add any particular tract or parcel of land to such Town, or by order of court vest in the Trustees, the same, taking bond with approved security, from the proprietor as in other cases, and the said Trustees shall proceed to lay off the land and streets and lots and dispose of the same agreeably to the direction of this act, and where any town has been heretofore established and not vested in Trustees, or where the same has been vested, and the same Trustees or a majority of them are dead or removed, it shall be the duty of the county court in which such Town may be, on application of the proprietor or without, if it shall to them appear necessary, to appoint Trustees for such Town or Towns, and the lands appropriated by law shall be vested in the Trustees so appointed and such Trustees shall have full power and authority to convey lots in like manner and possess the same powers as are given to other Trustees by this act and where lots have been sold and not conveyed, the said Trustees are hereby authorised and empowered to convey the same.

SEC. 6. The clerks of courts shall be entitled to the same fees to

be paid and collected in like manner, for the duties enjoined on them by this act, as for services of a similar nature.

RISDON MOORE

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved Dec. 19. 1814

NINIAN EDWARDS

AN ACT concerning County Courts

SEC. 1. Be it enacted by the Legislative Council and house of Representatives and it is hereby enacted by the authority of the same, That there shall be a court of record in each county in this Territory to be called and styled the county court to consist of three Judges, who shall be conservators of the peace, any two of whom shall form a quorum to be appointed and commissioned by the Governor. And the said court, shall have, and possess and exercise, all and every of the powers, privileges and Jurisdiction as near as may be, and perform the same duties, that the courts of common pleas of the respective counties, might lawfully have performed on the first day of November last, except so far as relates to the trial of causes civil and criminal, over which the county court shall have no Jurisdiction for the trial thereof

Section 2 The said courts shall annually hold three terms in their respective counties viz, In the county of Edwards, on the fourth mondays of the months of January April and August, yearly and every year. In the county of Galletin on the first mondays of the months of February May & September, yearly and every year. In the county of Johnson on the second mondays of the months of February May & September, yearly and every year. In the County of Randolph on the third mondays of the months of February May and September, yearly and every year. In the county of St Clair on the fourth mondays in the months of February, May & September. In the county of Madison on the first mondays in the months of March, June & September, yearly & every year. The Judges of said court shall respectively receive two dollars for every day they shall set, to be paid out of the county levy.

SEC. 3. Be it further enacted that when the courts of common pleas were directed to do or perform any duty or act at any particular Term thereof it shall be the duty of the county courts should

their terms not be held at the time prescribed by law, for holding those Terms of the common pleas to perform the same acts or duties at their Terms immediately preceding or succeeding those sessions of the courts of common pleas.

SEC. 4. Be it further enacted that the clerk of said court shall be appointed in the same manner in all respects as the clerks of the Courts of common pleas were appointed; and they shall have the same powers in court and in the vacation thereof and perform the same duties, that the clerks of common pleas, could or might have done, and the clerk shall have the same fees that are or may be allowed by law.

SEC. 5. Be it further enacted, That the said Judges shall have power to take all and every species of recognizances and obligations in matter civil and criminal, and they are hereby ordered, on proper affidavit to order bail in civil cases, as the Judges of the courts of common pleas might have done.

RISDON MOORE

Speaker of the House of Representatives

BENJAMIN TALBOTT

President of the Council protem

Approved Dec 19. 1814

NINIAN EDWARDS

AN ACT concerning Certioraries

SEC. 1. Be it enacted by the Legislative council and house of Representatives, and it is hereby enacted by the authority of the same, That no Writ of Certiorari shall hereafter lie to remove the proceedings had in any civil cause before any single Justice of the Peace in this Territory. And all such causes now pending on any Writ of Certiorari in any court of this Territory should the proceedings & Judgment of said Justice therein be reversed, for errors therein, then the party in whose favour the Judgment before the Justice of the peace was given, shall pay the costs of the removal, and also, of the reversal of said Judgments, and the said court that shall or may reverse said Judgment, shall at the same term of the reversal order an issue on the merits of said cause to be made up instanter & the case shall then proceed as other cases to final Judgment and execution

SEC. 2 Be it further enacted that on all Judgments that have

been or may be rendered by Justices of the peace, the party against whom such Judgment shall be rendered may appeal therefrom at any term within thirty days after the rendition of such Judgment any law to the contrary notwithstanding.

RISDON MOORE

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved Dec 19th 1814

NINIAN EDWARDS

*AN ACT defining and explaining the fees of Sheriffs and Clerks
in certain cases.*

Whereas unreasonable doubts have arisen relative to the amount of the sum which the sheriffs and clerks of the General Courts or Supreme Court are or hereafter may be legally entitled to receive out of the county Treasury for their respective services in the public prosecutions of those persons who are either or may be acquitted of the charge or charges exhibited against them or discharged, or unable to pay the fee, and for the removal of all such doubts.

SEC. 1. Be it enacted by the Legislative Council and house of Representatives and it is hereby enacted by the authority of the same, That the sheriffs and clerks of the Supreme or general Court of the respective Counties shall not be entitled to receive any compensation out of said Treasuries, for any services they or either of them may render in any prosecutions in which the Territory is party but in lieu thereof each sheriff shall receive out of his own County Treasury the sum of fifty dollars annually. And each clerk of the General or Supreme Court shall receive annually out of their respective County Treasuries the sum of thirty dollars in full, for all services of every description wherein the respective Counties or Territory may be chargeable to any of said officers.

SEC. 2. Be it further enacted that in all criminal cases, the witness and Jurors' and constables fees shall be taxed in all bill of costs as in civil causes which shall be paid according to law.

SEC. 3. Be it further enacted that upon executing a writ of execution and taking a repley bond thereupon the sheriff or coroner executing the same shall charge six cents per mile from the court house of his county to the place of actual service and also fifty cents

for the replevy Bond but no more. And if any sheriff or coroner shall charge, demand or receive any more or greater or other fees he shall forfeit and pay to the party injured or attempted to be injured thereby six dollars for every item so unjustly charged demanded or taken by action of debt before any court having Jurisdiction thereof.

SEC. 4. If there be more persons than one named in any writ or subpoena, the travel shall be computed from the court house of the county of said sheriff to the place of service which shall be the most remote, adding thereto the extra travel, which shall be necessary to serve it on the other or others. Provided always that that extra travel shall not exceed the distance between the place of service and the court house of said sheriff's county, and it shall be the duty of said sheriff or coroner to endorse on each writ or subpoena he may execute the distance he has traveled to execute the same regulating the calculation of the mileage thereof according to the provisions of this Section, and it shall be the duty of the sheriff to charge mileage to the place he actually executes any writ or subpoena and for no more, and if the sheriff or coroner shall charge demand or receive more or greater or other fees than are hereby allowed or if he shall not make his return as above directed, he shall forfeit and pay to the party injured or attempted to be injured or who may by the event and termination of the suit be injured thereby for every item thus illegally charged or demanded or received the sum of six dollars to be recovered by action of debt by any person injured or attempted to be injured thereby in any court having jurisdiction thereof. And if any sheriff or coroner shall neglect or refuse to make his return as above directed, on all writs and subpoenas, he shall forfeit and pay to the party injured thereby who will sue for the same the sum of fifty dollars.

RISDON MOORE

Speaker of the House of Representatives

BENJAMIN TALBOTT

President of the Council protem

Approved Dec 20th 1814

NINIAN EDWARDS

*AN ACT declaring the eligibility of certain officers to a seat
in the Legislature*

Whereas the free people of this Territory are as competent as their public servants to decide on whom it is their interest to elect to repre-

sent them in the General Assembly : and are too enlightened and independent to recognize the odious and aristocratical doctrine “that they are their own worst enemies” or to admit that it is the duty of their representatives to save the people from themselves.

And whereas this Legislature being composed of the servants and not the masters of the people, cannot without an arbitrary assumption of power impose restrictions upon the latter as to the choice of their representatives which are not warranted by the express words or necessary implications of the ordinance from which the Legislature derives its powers.

And whereas the duties of the Judges of the county courts established by law are such as have heretofore been performed in this Territory by Justices of the peace by whom they are also usually performed in many of the states and there being nothing in the ordinance, nor any reason to exclude from a seat in the Legislature those Judges of the county courts or county surveyors or prosecuting attornies that do not apply with equal force to militia officers and Justices of the peace and the duties of the former being no more incompatible with a seat in the Legislature than those of the latter, Therefore

SEC. 1. Be it enacted by the Legislative Council and house of Representatives and it is hereby enacted by the authority of the same that all laws or parts of laws creating any distinction as to eligibility to a seat in the Legislature between Judges of the county courts county surveyors and prosecuting attornies or district attornies under the United States, on the one hand and justices of the peace on the other shall be and the same are hereby, abolished, and that hereafter if the free and qualified voters of this Territory shall choose to elect any Judge of a county court any county surveyor or any prosecuting attorney they shall have the same right to do so as they have hitherto had to elect Justices of the peace or militia officers.

RISDON MOORE

Speaker of the House of Representatives

PIERRE MENARD

president of The Councill

Approved Dec 22, 1814

NINIAN EDWARDS

AN ACT *concerning the Kaskaskia Indians.*

Whereas a former law of this Legislature has been found insufficient to prevent evil disposed persons from selling and giving intoxicating drinks to the Kaskaskia Indians or from cheating and defrauding the said indians out of their property by pretended or real purchases and whereas the former practice is productive of disorder, and other pernicious consequences and the latter a violation of moral Justice and good policy. For remedy thereof,

SEC. 1. Be it enacted by the legislative council and house of Representatives and it is hereby enacted by the authority of the same That if any white person or free person of color either male or female shall hereafter without license from the Governor as superintendent of indian affairs within this Territory or from some sub-agent appointed by him either sell to give to any Kaskaskia Indian or any other indian residing with them any quantity of whiskey, gin, brandy, rum, cider or other intoxicating drink such person so offending shall forfeit and pay twenty dollars to be recovered upon warrant before any Justice of the peace who shall upon conviction of such offence issue execution returnable in thirty days against either the body or goods of such offender as may be required of the said Justice of the peace, and upon such execution there shall be no security whatever taken.

SEC. 2. If either of the offences stated in the above section, shall be committed by any negro or mullatto being the slave or servant of any person whatever, It shall be the duty of a Justice of the peace upon application to him made according to law to issue his warrant against such negro, or mullattoe and upon proof of the offences above mentioned or either of them having been committed by said negro or mullattoe, the Justices of the peace before whom such proof may be made shall, order him or her so offending to receive on his or her bare back if for the first offence fifteen lashes and for every subsequent offence of like kind double that number. Provided however that the said corporal punishment shall not be inflicted if the owner or any other person will in behalf of said negro or mullattoe pay the sum of twenty dollars for each offence respectively.

SEC. 3. That it shall not be lawful for any person whatever without license from the Governor or some sub-agent appointed by him to purchase or receive by gift or otherwise of any of the before mentioned indians, any horse mare gun Tommahawk, knife, Blanket Strouding, calico, saddle bridle, or any goods wares or merchandize

whatever, that all such sales and purchases, or gifts shall be considered as fraudulent on the part of the buyer or receiver, and that any white person or free person of colour whatever so buying or receiving any such articles of any one of those Indians shall be liable to pay a fine of twenty dollars to be recovered before a Justice of the peace who shall upon conviction of any such offender issue execution in like manner as is directed in the first section of this act, and the said offender shall restore the article or articles so bought or received & shall moreover be liable to a suit in the supreme court for the fraud of buying or receiving any such article as aforesaid whatever the amount or value thereof may be and in all cases of Judgment against him or her; he or she shall pay the costs.

SEC. 4. If either of the offences stated in the last preceding section of this act shall be committed by any negro or mullatto being the slave or servant of any other person, the said negro or mullatto so offending shall be subject to the same proceedings and punishment under the same conditions as are prescribed in the second section of this act, and the owner shall either cause said negro or mullatto to restore any article or articles so purchased, or received by him or her or said owner shall be liable in default thereof to the same proceedings as if such owner had actually himself or herself bought or received the said article or articles contrary to the intention of this law.

SEC. 5. In all the above cases and in all other cases of injuries done to the said indians it shall be lawful for the Governor of the Territory or any sub-agent appointed by him, to sue or warrant as the case may require in behalf of any such injured indian.

SEC. 6. All fines imposed by this law after deducting thereout all necessary expenses, shall be paid by the Governor or a subagent, to the injured indian or Indians

SEC. 7. It shall be the duty of all Justices of the peace, sheriffs and constables to aid and assist in the execution of this law according to their respective offices.

RISDON MOORE

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved Dec 22. 1814

NINIAN EDWARDS

AN ACT empowering the clerks of the supreme court to administer oaths in certain cases and for other purposes.

Whereas the existing law, requiring that the Governor, of the Territory shall administer the oaths prescribed by law to all officers appointed under the authority of this Government or that he shall issue a *dedimus potestatem* in such cases to some other person for that purpose is found to be productive of inconvenience, and subject to disappointments and delays in consequence of the extent of the Territory and various casualties that attend the sending special powers, For remedy whereof

SEC. 1. Be it enacted by the Legislative Council and house of Representatives of the Illinois Territory and it is hereby enacted by the authority of the same, That the clerks of the supreme court in the respective counties in which they are clerks shall be authorised, and are hereby required to administer the oaths prescribed by law to all persons who may be appointed to offices, within their respective counties whenever thereto required by any person producing a commission from the Governor appointing him to an office as aforesaid. And it shall more ever be the duty of each clerk as aforesaid to make and preserve a record of all such cases, and transmit once in every three months a list of those persons to whom he may have administered such oaths, together with the several dates thereof to the Secretary of the Territory.

SEC. 2. Be it further enacted, that in all cases whatever in which it has heretofore been the duty of the respective clerks of the courts of common pleas to receive redemption money, for lands sold for taxes, that duty shall hereafter be performed by the respective clerks of the supreme court, in their respective counties, and they shall in all respects, whatever be subject to the same Laws which now govern the said clerks of common pleas in such cases.

SEC. 3 Be it further enacted, That all clerks of courts shall be and hereby are authorised and empowered to administer all oaths upon any affidavit to be presented to the courts of which they are or may be the clerks, and all other oaths whatever appertaining to the business of their respective offices.

RISDON MOORE

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved Dec 22. 1814

NINIAN EDWARDS

AN ACT concerning Indictments and presentments.

SEC. 1. Be it enacted by the Legislative Council and house of Representatives, and it is hereby enacted by the authority of the same, That where two or more persons shall be indicted for the same trespass or misdemeanor no more costs shall be allowed than if it were against one only.

SEC. 2. Be it further enacted that in all cases of Treason, murder or felony no prosecutor shall hereafter be required.

SEC. 3. That in all cases of indictments or presentments for trespass or misdemeanor where the presentment or indictment shall be made from the knowledge of two of the grand Jury, or upon information of a conservator of the peace in the necessary discharge of his duty, it shall be so stated at the foot of the indictment or presentment, and no prosecutor shall be required, but in all other cases there shall be a prosecutor. This act shall take effect from the passage thereof.

RISDON MOORE

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved Dec 22. 1814

NINIAN EDWARDS

AN ACT concerning negroes and Mullattoes.

Whereas the erection of mills and other valuable improvements are greatly retarded in this Territory, from the want of Laborers, and whereas also experience has proved that the manufacture of salt in particular, at the United States Saline cannot be successfully carried on by white laborers, and it being the interest of every description of inhabitants to afford every facility to the most extensive manufacture of that article, so necessary to them all, as the most natural means of obtaining a certainty of the necessary supplies thereof at the lowest price.

SEC. 1. Be it enacted by the Legislative Council and house of Representatives of the Illinois Territory, and it is hereby enacted by the authority of the same That if any slave whatsoever, shall voluntarily hire himself or herself, within the Territory, by the consent of his or her master, for any term not exceeding twelve months, his or her continuance in the Terriotry according to such hiring shall not operate in any way whatever to injure the right of property in the master, in and to the services of such slave or slaves, Provided however

that in all such cases such slave or slaves shall be examined privately, separate and apart from his or her owner by a Justice of the peace, or any clerk of a court, as to his or her voluntary consent, and a certificate of such Justice or clerk shall be conclusive evidence of such Voluntary consent, and may be admitted to record, and provided that said slave or slaves, shall for the time being, be considered and treated as indentured servants. This act shall commence and be in force from the passage thereof.

RISDON MOORE

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved Dec 22. 1814

NINIAN EDWARDS

AN ACT *to amend an act entitled "An act to amend an act entitled an act to establish and regulate ferries.*

SEC. 1. Be it enacted by the Legislative Council and house of Representatives and it is hereby enacted by the authority of the same. That so much of the act entitled an act to amend an act entitled an act to establish and regulate ferries, as declares that no ferry shall be established by the court of common pleas in any county in this Territory across the Ohio and Mississippi Rivers within less than two miles of an established ferry shall be and the same is hereby repealed.

SEC. 2. That in all future cases the county courts may grant any ferry according to law that the respective county courts in their several counties may deem necessary.

RISDON MOORE

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved Dec 22. 1814

NINIAN EDWARDS

AN ACT *for levying and collecting a tax on billiard Tables*

SEC. 1. Be it enacted by the Legislative Council and house of Representatives and it is hereby enacted by the authority of the same, That all and every person or persons who shall erect or keep a billiard table within this Territory shall annually on the first monday in January, or within one week after erecting such Billiard Table enter

the same with the assessor of the county in which such Billiard table shall be erected and it shall be the duty of the Sheriff at the same time and in the same manner as pointed out by law to collect the tax on land to receive and collect from each person having entered such billiard table the annual sum of forty dollars to be paid and accounted for by said sheriff in the same manner as the other revenue taxes are accounted for.

SEC. 2. If any person or persons who shall so keep or erect any such billiard table shall refuse or neglect to enter the same as afore-said he or she so offending shall on conviction thereof by presentment or indictment be fined in any sum not less than forty dollars nor more than eighty dollars with costs.

SEC. 3. In case of non payment of the tax on the days whereon the same ought to be paid the sheriff shall levy the same by distress and sale of the delinquents goods and chattels having previously given ten days notice of the time and place of such sale and the Territory shall have a lien on the said Billiard table for the said taxes.

SEC. 4. All audited accounts against the Territory shall be received by the sheriffs as collectors in payment of said Tax.

RISDON MOORE

Speaker of the House of Representatives

PIERRE MENARD

President of The Council

Approved Dec 22. 1814

NINIAN EDWARDS

AN ACT to encourage the Killing of Wolves.

Be it enacted by the Legislative Council and house of Representatives and it is hereby enacted by the authority of the same, That the law passed in the Territory of Indiana on the fourteenth day of September 1806 entitled an act to encourage the killing of wolves shall be and the same is hereby revived and shall be in force in this Territory from the passage hereof any law to the contrary notwithstanding.

RISDON MOORE

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved Dec 22. 1814

NINIAN EDWARDS

*AN ACT Supplemental to an act entitled "An act to establish a
Supreme Court for Illinois Territory.*

SEC. 1. Be it enacted by the Legislative council and house of Representatives, and it is hereby enacted by the authority of the same, That so much of any law whatever as gives the style of the "General Court" to the court heretofore required to be held by the supreme or superior Judges of this Territory, who hold their appointment from the president and Senate of the United States, and also all laws or parts of laws inconsistent with the provisions of the act to which this is a supplement, shall be and they are hereby repealed.

SEC. 2. That in all cases whatever the provisions of this act, and that to which this is a supplement, shall have preference to provisions in any former law, where-ever the same subject is embraced.

SEC. 3. That all powers and duties which were previous to the passage of the act to which this is a supplement, vested in and enjoined on the Judges of the courts of common pleas and Judges of the General Court so far as the same are connected with the Jurisdiction or duties of the supreme court of Illinois Territory shall be vested in and exercised by the Judges of the Supreme court which shall perform all the duties imposed on the former General Court not inconsistent, with the provisions of this act and that to which it is a supplement.

SEC. 4. That all suits and other matters or things now depending in the General Court, shall be tried and finally disposed of by the Supreme Court required to be held at Kaskaskia, in the same manner as if this law, and that to which it is a supplement, had not been enacted. And all process and other proceedings which would have been necessary to bring said suits or other matters to a final termination, shall and may be pursued, as though no change had taken place. Provided, however that the style of the court now given in lieu of the former style shall be observed in all proceedings requiring any style to be used

RISDON MOORE

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved Dec 22, 1814

NINIAN EDWARDS

AN ACT concerning Justices of the peace.

SEC. 1. Be it enacted by the Legislative Council and house of Representatives and it is hereby enacted by the authority of the same. That the Justices of the peace who have been or shall be appointed and commissioned in and for the several counties in this Territory that now exist & in such counties as may hereafter be created shall Jointly or severally have full power to keep and cause to be kept all laws at present in force or that may hereafter be made for the conservation of the peace, and for the good Government of the citizens and inhabitants of this Territory within the said counties respectively according to the force from and effect of all such laws, of which they now have or hereafter may have Jurisdiction and to apprehend, imprison and punish all persons offending against those laws or any of them in the said respective counties in such manner as according to those laws shall be right and proper, and to cause to come before them, or any of them, all persons who shall break the peace or have used or shall use threats against any citizen or inhabitant, or any person within this Territory, and under the protection of its laws concerning his or her bodies, or the firing of his or her house barn or other buildings or the unlawful distruction or injury of his or her property, and also such persons who are not of good fame, where they are found to enter into recognizance with sufficiently surety for the peace or their good behaviour towards the people and inhabitants of this Territory, and all those under the protection of its laws— And if the persons against whom such proceedings are directed shall fail to enter into such recognizance, it shall be the duty of the Justice of the Peace to cause him or her to be safely kept in prison till he or she shall do the same And further the said Justices shall have power to perform and it shall be their duty to execute all such matters acts and things as by law appertain to their office and are or shall be enjoined on them and committed to their charge & execution

SEC. 2. That every Justice of the peace who shall take any recognizance for the keeping of the peace or good behaviour shall also make it a condition in said recognizance that he she or they therein bound shall appear on the first day of the next succeeding session of the supreme court to be holden in the county in which the case shall happen and continue to abide there till discharged by said court it shall also be the duty of said Justice to recognize all the witnesses to appear at said court to testify against the offender and it shall be the

duty of such Justice to return the recognizances thus required to be taken by him to said court which shall direct the parties bound to be called, and if they or any of them fail to appear then default shall be entered and there recorded and the recognizances shall be prosecuted to effect. If however the party bound shall appear the said court shall hear the evidence and may discharge or continue the recognizance as shall appear to be most consistent with law.

SEC. 3. It shall be lawful for any Justice of the peace upon oath being made before him that any person hath committed, or that there is Just grounds to suspect that he or she hath committed any criminal offence within his county to issue his warrant to arrest the person so charged, and to enquire into said charge and commit the person so charged to Jail, or bail or discharge him according to the proof that may be adduced and to the law arising thereupon. Provided however that said Justices shall have no power to admit to bail or main prize any person or persons charged with treason, murder manslaughter, sodomy rape, arson, burglary, robbery, forgery or suspicion thereof, or with any crime, punishable with death or burning in the hand or elsewhere, and in all cases where the said Justices shall admit to bail or mainprize, they shall recognize the party bound to appear on the first day of the next succeeding session of the supreme court, in the county in which the transaction may happen there to remain till discharged by said court, and in all cases where justices of the peace, shall either commit the person or persons charged to jail or admit him or her to bail or mainprize, the said Justices shall recognize the witnesses to appear at the time aforesaid and at the court aforesaid to give testimony in the case whenever thereto required.

SEC. 4. Be it enacted by the authority aforesaid, That in case any person against whom a warrant shall be issued by any Justice or Justices of the peace of any county of this Territory for any offence therein committed or done shall escape go into, reside, or be in any other county out of the Jurisdiction of the Justice or Justices granting such warrant as aforesaid it shall and may be lawful for and it is hereby declared to be the duty of any Justice or Justices of the peace of the county when such person shall escape, go into, under, or be upon proof being made upon, oath or affirmation of the hand writing of the Justice or Justices granting such warrant to endorse his or their name or names on such warrnat, which shall be a sufficient authority to the person or persons bringing such warrant, and to

all other persons, to whom such warrant was originally directed to execute such warrant in such other county out of the Jurisdiction of the Justice or Justices granting such warrant as aforesaid, and to apprehend and carry such offender before the justice of justices who endorsed such warrant or some other Justice or Justices of such such other county where such warrant was endorsed, and in case the offence for which such offender shall be so apprehended as aforesaid shall be bailable in law by a Justice of the peace, and such offender shall be ready & willing to give bail for his or her appearance at the next succeeding session of the supreme court to be holden for the county in which the offence was committed such Justice or Justices of the peace of such other county before whom such offender shall be brought, shall and may take bail of such offender for his or her appearance at the next succeeding session of the supreme court to be held in and for the county where such offence was committed, in the same manner as the Justices of the peace of the property county might have done, and the Justice or Justices of such other county so taking bail as aforesaid, shall deliver, the recognizance of bail, and all other proceedings relating to said offender and offence before him had to the constable or other person or persons, so apprehending such offender as aforesaid who is and are hereby required to receive the same, and to deliver over as soon as practicable, such recognizance, and other proceedings to the clerk of the supreme court in the county when the offender may be required to appear by virtue of such recognizance—And such recognizance and other proceedings shall be as good and effectual in law to all intents and purposes, and of the same force and validity as if the same had been entered into taken or acknowledged before a Justice or Justices of the peace, in and for the proper county where the offence was committed, and the same proceedings shall be had thereon. And in case such constable or other person, to whom such recognizance or other proceedings, shall be delivered as aforesaid shall refuse or neglect to deliver over the same to the clerk of such court as aforesaid where the offender is required to appear by virtue of such recognizance, such constable or other person shall forfeit thirty dollars, to be recovered against him with costs by action of debt, bill plaint, or information in any court of record having cognizance thereof, by any person or persons who will prosecute or sue for the same And in case the offence for which such offender shall be apprehended in any other county as aforesaid, shall not be bailable

in law by a Justice of the peace, or such offender shall not give bail for his or her appearance in the manner and according to the mode herein prescribed to the satisfaction of the Justice or Justices before whom such offender shall be brought in such other county, then the constable or other person so apprehending such offender shall carry and convey such offender before one of the Justices of the peace in the proper county where such offence was committed there to be dealt with according to law.

SEC. 5. Be it enacted by the authority aforesaid, That no action of Trespass or false imprisonment, or information or indictment shall be brought, sued, commenced, exhibited or prosecuted by any person or persons whatsoever, against the Justice or Justices who shall endorse such warrant for or by reason of his endorsing the same, but the person aggrieved, shall have all the redress he may be entitled to against the Justice or Justices who originally granted such warrant in the same manner as such person or persons might have had in case this clause in this act had not been made

SEC. 7. Be it further enacted by the authority aforesaid. That the Justices of the peace in each county in this Territory shall have cognizance in all cases wherein the demand shall not exceed twenty dollars in which said causes they may give Judgment and thereupon aware execution and in all such cases discounts shall be allowed, and, the Justices shall give Judgment either for the plaintiff or defendant as the case may be, Provided the plaintiff have reasonable notice that such discount is intended to be offered. Provided always that no execution shall be issued against the body of any defendant unless the Judgment exceed the sum of four dollars which execution shall be executed and returned by the sheriff or constable to whom directed in the same manner as other executions are to be executed and returned.

SEC. 6. Be it further enacted by the authority aforesaid. That in all cases as aforesaid brought before any Justice of the peace, the best evidence to establish the demand of either plaintiff or defendant shall be required. Provided however that in all cases where either party may not have a witness or other legal evidence to establish a demand or discount or set off, the party claiming such demand or discount shall be permitted to prove the same by his own oath, if the adverse party shall refuse to deny the same upon his oath which the Justice of the peace before whom the case may be depending shall

be authorised to tender or administer to the party who may deny or refuse to admit such demand or discount, and no person shall be permitted by said Justices of the peace to deny his bond, promissory note, or bill for money or other thing unless such person shall first make affidavit to the truth of such denial.

SEC. 7. And be it further enacted by the authority aforesaid, That in case any person after being summoned to answer any complaint for debt before any Justice shall before the day of trial remove out of the county in which he was so summoned such Justice may nevertheless give judgment against him in the same manner as if he had been personally present. And if any person after Judgment of such Justice shall remove out of the county before satisfaction made such Justice may issue execution against such person which may be levied by any sheriff or constable of the county to which such person may have removed Provided that in all such cases the Justices so issuing such execution to another county shall endorse on the back thereof that the party had removed after Judgment.

SEC. 8. And Be it further enacted by the authority aforesaid that it shall be the duty of constables to levy all executions put into their hands agreeably to the tenor thereof and to make due returns of the same together with all summons or warrants to the magistrate to whom they may be made returnable. and if any constable shall fail to execute and make such returns or to pay to, or account with any person for whom he may have received money on execution within ten days after the receipt thereof, the person so injured as aforesaid may upon application to any Justice within the county obtain a warrant against him; and such Justice shall upon proof thereof, award Judgment and execution for the same, and all costs against such constable, and also fine him for such abuse in a sum not exceeding ten per cent on the amount so withheld; and in case of neglect or refusal to serve and return any warrant or summons as aforesaid, may fine the constable so offending in a sum not exceeding the amount of the demand against the defendant.

SEC. 9. Be it further enacted by the authority aforesaid that Justices of the peace may issue summons for witnesses in any cause civil or criminal to be tried or enquired into by them which being served three days before the trial, such witness shall be subject to a fine of three dollars for default and the Justice may issue execution for the amount, Provided said witness having notice to attend to

answer such default shall not be able to shew a sufficient excuse for not attending as required to do.

SEC. 10. And be it further enacted by the authority aforesaid, that if any Justice of the peace shall be insulted or unlawfully disturbed in the execution of the duties of his office said Justice shall have power to fine any person so offending in any sum not exceeding ten dollars or to imprison or confine such offender for the space of twenty-four hours, and all constables, sheriffs or other citizens shall be aiding and assisting said Justice in the execution of such imprisonment, or on their failure so to do the said Justice shall have power to fine any and each of them in any sum not exceeding ten dollars and to issue execution thereupon.

SEC. 11. All fines that may be inflicted by Justices of the peace, shall be accounted for and go in aid of the county levy.

SEC. 12. No justice of the peace shall hereafter be obliged to keep any docket.

SEC. 13. Be it etc. That the county courts in their respective counties shall cause to be erected and kept in good repair, or where the same shall be already built shall maintain and keep in good repair at the charge of the county one good convenient courthouse and one sufficient Jail and shall for that purpose be and hereby are empowered to levy a tax on the county at the time and in the manner provided by law.

SEC. 14. Be it further enacted, That the said county courts shall have full power and authority at all times, to enquire into the conduct of Jailors & the state of Jails in their respective counties & on neglect of duty to cause such Jailors to be removed by an order to the sheriff for that purpose.

SEC. 15. Be it etc that the said county courts, shall and they are hereby empowered, and required to cause to be marked, bounded and recorded the bounds and rules of their respective county prisons, not exceeding ten acres, which marks and bounds may be renewed from time to time as occasion may require, but every alteration in those marks and bounds shall be recorded. And every prisoner not committed for treason or felony giving good security to the sheriff to keep within the said rules shall have liberty to talk therein, out of the prison, and keeping within said bounds, shall be adjudged in a law a true prisoner.

SEC. 16. Be it etc. That in all Judgments given by a Justice

of the peace when the amount thereof shall exceed four dollars the party against whom such Judgment shall be given, shall have a right to appeal from the same to the next county court to be held for the county wherein the Judgment from which the appeal is made, and the setting of the court. Whereupon the Justice or Justices who gave such Judgment shall suspend all proceedings thereon, and shall return the papers and the Judgment he had given to the clerk of said county and the said court shall thereupon at their next session hear and determine the same in a summary way without pleading in writing, according to the Justice of the case, unless the said court for good cause to them shewn shall continue the same to the next court beyond which second court the said appeal shall not be continued, Provided however that the said court shall at all times admit of any amendment of the papers or proceedings that may be necessary to a fair trial of the cause upon its own intrinsic merits—And execution may be taken out on a judgment given by the said court on such appeal in the same manner as if the cause had been originally instituted in said court. In all cases where a party may desire to appeal from a Judgment of a Justice of the peace pursuant to this act, he shall receive from the justice a copy of such judgment, and produce the same to the clerk of the county court, and shall enter into bond in the office of such clerk, in a penalty double the sum of such Judgment with security who shall be approved of by the Justice from whose judgment the appeal is made, such bond shall be conditioned for the payment of the debt and costs in case the Judgment shall be affirmed on the trial of the appeal. Upon the execution of such bond the clerk shall certify the same to the magistrate and constable enjoining further proceedings and issue a summons to the appellee to appear to appear at the court to which the appeal is returned, noting the day the same shall be set for trial by the clerk. The constable shall summon the appellee, his agent, or attorney if within the county, which summons shall be executed, ten days before the court where the same shall be tried.

SEC. 17. Be it etc. That where the appellee shall reside in another county the clerk of the court to which the appeal is made, shall have power and authority to issue a summons to cause such appellee to appear before the court, which summons shall be executed by the appellant or some other person for him on the appellee, and satisfactory proof of such service shall be made, to the court to which

the summons shall be returned: & if the appellant shall neglect to execute or cause to be executed such summons upon the appellee before the second court after praying an appeal, the Judgment of the Justice shall stand confirmed.

SEC. 18. Be it etc. that it shall be the duty of the justice who gave the judgment to lodge with the clerk at or before the next court any papers produced and read on the trial before him. and if no papers to certify the same to the clerk, noting thereon all the costs. The clerk shall docket the cause in order, The court shall proceed and determine the appeal in a summary way at their next court and give such judgment as to them shall seem Just with respect to the costs as well as the debt. but may grant a continuance if they deem it right to the next court, but not longer. And in all appeals from the Judgment of a Justice or Justices of the peace the party shall have the benefit of all legal testimony that was before the justice of the peace who rendered the judgment, or that might have been lawfully admitted by said justice in the trial before him

SEC. 19. Be it etc. That the said county courts shall have power to issue all process of every description that may be necessary to the execution of the powers with which they are or may be invested. All officers who were bound to obey the judgments or orders or proceedings of the courts of common pleas in those cases in which the Jurisdiction of those courts of common pleas in by this law transferred to the county courts, shall be equally subject to the authority of the county courts, and be bound to perform the same duties in regard to them—in like manner as if there had been no change in those courts except as to the name only.

SEC. 20. Be it etc. That the county courts when acting in their judicial capacity shall have the same power to furnish contempt of their authority as the supreme court does or may possess, and all Judgments given by said courts upon appeal shall be final.

This law shall take effect from and after the passage thereof.

RISDON MOORE

Speaker of the House of Representatives

PIERRE MENARD

President of The Councell

Approved Dec 24. 1814

NINIAN EDWARDS

AN ACT *supplemental to an act entitled "An act concerning
County Courts.*

Whereas it is advisable to remove all doubts that may arise as to the powers vested in the county courts, and the Judges and clerks thereof

Be it enacted by the Legislative Council and house of Representatives, and it is hereby enacted by the authority of the same, That the county courts established by the act to which this is a supplement, and the Judges of said courts shall possess and exercise, all the Jurisdiction and perform all the duties heretofore vested in or required of the courts of common pleas or the Judges thereof except such as have been transfered to the supreme court or the Judges thereof.

That the clerks to be appointed for the said county courts shall perform all the duties heretofore vested in or required of the clerks of common pleas, so far as the same duties relate to the powers and jurisdiction of said county courts and all other duties that have not been transfered either expressly or by necessary complication to the clerks of the supreme courts but in neither of the latter cases shall the said clerks of county courts, have any power whatever.

RISDON MOORE

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved Dec 24. 1814

NINIAN EDWARDS

AN ACT *Regulating the fees of Justices of the peace, constables
& Recorders*

Be it enacted by the legislative council & house of Representatives, & it is hereby enacted by the authority of the same, that the following shall be the standing fees to govern the Justices of the peace, constables and recorders of this territory.

| | \$ | cts |
|---------------------------------|----|-----|
| For every summons or Warrant | " | 12½ |
| Each subpoena | " | 12½ |
| Each continuance | " | 6¼ |
| Swearing each Witness on trial | " | 6¼ |
| Every deposition in full length | " | 25 |
| Entering up Judgment | " | 25 |

| | \$ | cts |
|---|----|------|
| For every Execution | " | 25 |
| Entering Security when required | " | 121½ |
| Seire facias to be served on security, when execution is returned "nothing to be found" | " | 25 |
| Each notification, when the cause is to be left to referees | " | 25 |
| Entering award and final Judgment thereon | " | 371½ |
| Taking Deposition of each witness on Dedimus from another Territory or county | " | 25 |
| Returning Dedimus, Certificate and sealing and directing same | " | 371½ |
| Entering appeal from Judgment of Justices | " | 25 |
| Bond on appeal | " | 371½ |
| Copy of the proceedings on Justices Judgment | " | 25 |
| For taking acknowledgment on a deed or other Instrument of Writing (or proving the same for each person named therein | " | 25 |
| On attetchment for taking deposition | " | 18¾ |
| Granting Atteachment, taking Bond & Security | " | 75 |
| Entering up Judgment on the same | " | 371½ |
| Putting the same on Docket | " | 121½ |
| On forcible entry and detainer for each precept | " | 371½ |
| Administering each oath thereon | " | 121½ |
| To each Justice of the peace on trial pr day | 2 | .50 |
| Copy of proceedings & making out the same | 2 | .50 |
| In Criminal cases. | | |
| Taking each deposition at full length | " | 25 |
| Each Warrant | " | 25 |
| Each Recognizance | " | 371½ |
| Each Mitimus | " | 371½ |
| Order for those who misbehave to be whipped | " | 371½ |
| Order to remove a pauper | " | 50 |
| Order to relieve a pauper | " | 371½ |
| Constables Fees. | | |
| For serving & returning each Warrant | " | 371½ |
| Serving summons & returning the same | " | 31¼ |
| Serving Execution & returning the same | " | 371½ |
| Advertising property taken in Execution for sale | " | 121½ |
| Commission on Sales under Six Dollars | " | 25 |

| | \$ | cts |
|--|-----|----------|
| Commission on Sales above Six Dollars | six | per cent |
| Attending on each trial | " | 12½ |
| Mileage from the Justices dwelling 5 cents per mile | | |
| For each days attendance on the general Court or Court of common pleas | " | 1.00 |

In Criminal Cases.

| | | |
|--|---|----|
| For serving a warrant on each person therein named | " | 50 |
| Attending an examination | " | 25 |
| For serving subpoena on each person therein named | " | 25 |
| For returning each precept | " | 6¼ |
| Taking each person to Jail | " | 25 |
| Mileage from the place of commitment per Mile | " | 5 |
| Mileage from the Justice of the peace on all criminal cases the same | " | 5 |
| Whipping each person for misdemeanor by order of any court or Justice of the peace | " | 50 |

Recorders Fees, etc.

| | | |
|--|---|-----|
| Recording Deeds Mortgages & all other Instruments of writing per 100 words | " | 16 |
| For all copies of Records per 100 words | " | 12½ |
| For every search for each year back | " | 6¼ |
| For certificate of any writing recorded | " | 50 |
| Every Seal when required | " | 25 |

Be it further enacted that all Laws and parts of Laws that come within purview of this act shall be and the same are hereby repealed. This Law shall be in force from and after the first day of May next.

RISDON MOORE

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved Dec. 24. 1814

NINIAN EDWARDS

AN ACT to amend an act entitled an "act to regulate proceedings in civil cases and for other purposes.

SEC. 1. Be it enacted by the Legislative council and house of Representatives and it is hereby enacted by the authority of the same, That so much of the act, "entitled an act to regulate proceedings in

civil cases and for other purposes'' as permits either party to continue the suit at the first court without showing cause shall be and the same is hereby repealed and all causes shall be tried at the first court unless good cause shall be shewed for a continuance.

SEC. 2. The clerks in making out the court docket shall arrange and apportion the suits at law as heretofore, but shall put all the chancery causes at the end of the common Law issues in the order they were set for hearing and the courts shall proceed to take up the business in order as it stands upon the docket, and go through the same Provided always that any chancery cause may be taken up by consent of parties, when the court may have leisure to hear the same any law, custom or usage to the contrary notwithstanding.

SEC. 3. That in every motion for the continuance of a 'cause founded upon the absence of a witness or witnesses the party making the same shall exhibit and file a written affidavit in which he or she shall distinctly set forth what he or she expects to prove by said absent witness or witnesses, and if the court should not think the facts so set forth in such affidavit material or rellevant to the point in issue or if the adverse party will admit the same the cause shall not be continued upon the grounds or for the causes set forth in said affidavit. Provided always that nothing herein shall be construed to dispense with the duty of any party to have used due diligence in procuring his or her testimony.

RISDON MOORE

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved Dec 24. 1814

NINIAN EDWARDS

AN ACT appointing a County Treasurer, and defining the duties of collectors and Treasurers.

SEC. 1. Be it enacted by the Legislative Council and house of Representatives of the Illinois Territory, and it is hereby enacted by the authority of the same. That so much of the law of this Territory as makes the sheriffs of the respective counties, Treasurers thereof, be and the same is hereby repealed.

SEC. 2. Be it enacted by the authority aforesaid, That there shall be appointed by the Governor one fit person in each county to be

treasurer thereof, who shall give bond and sufficient security, to be approved of by the county court of his county as the law directs in the penal sum of two thousand dollars for the faithful performance of his duties and he shall be under the same rules and regulations, and exposed to the same fines and forfeitures as the sheriffs as treasurers were for any failure of duty of his said office. And that he shall perform all the duties required by the different laws of this Territory of county treasurer And the said Treasurer shall receive as a compensation for his services five per cent for all monies that he may as treasurer receive and pay out; and it shall be his duty to pay all sums of money as the law directs on proper vouchers being exhibited to him due by his county. And it shall be the duty of the Governor to appoint a treasurer in each county as soon as may be after the date hereof

SEC. 3. And be it further enacted that it shall be the duty of said Treasurer to settle with the county court of his county at each session thereof annually for all monies he shall before said court at any time have received, and paid out with his vouchers for the same. And it shall be the duty of the district or Territorial attorney to be present at said settlement with the Treasurer once in each year, and he shall aid the court in deciding on the validity of the vouchers presented by him in the said settlement and all payments shall at all times be accompanied with a list of the persons names to whom payment is made the amount and what for, and the attorney so attending shall receive out of each county Treasury he attends the sum of ten dollars therefore annually.

SEC. 4. And be it further enacted that it shall be the duty of each sheriff of the respective counties to settle with and pay into the Treasury of their respective counties at each and every county court, yearly and every year from the date thereof all arrearages of his county levy, and all other monies belonging to the county Treasurer under the penalty of one thousand dollars for refusing or failing to comply with the provisions of this section to be recovered for the use of the county in any court of record having Jurisdiction thereof. It shall be the duty of the Treasurer where he finds on the Books of the court of his county that the sheriff has not paid the full amount of the tax for any preceding year he shall inform the prosecuting attorney thereof whose duty it shall be to institute an action against any of said sheriffs for the recovery of the sum apparently due to

the county Treasury. But he shall be allowed a deduction out of the amount of the county levy, for the real delinquencies and insolvencies, and for no more, in all payments to the Treasurer, the sheriff shall be obliged to exhibit a list of the persons names from whom he received the same with the respective amounts to each name annexed.

SEC. 5 Be it further enacted that it shall be the duty of the sheriff of the respective counties, to put up on the most public places of the court house of his county on the first day of the court next after or at which he makes the last settlement, for any year as directed by this law, a list of all the names of the delinquents and insolvents for which he claims a deduction on his said settlement with the county treasurer, and should said sheriff return untruly any name or names for any person or persons as delinquent or insolvents for every such name so returned, he shall forfeit and pay to the use of the said county of which he is sheriff the sum of twenty-five dollars in any court having Jurisdiction thereof.

SEC. 6. Be it further enacted that it shall be the duty of each treasurer to put upon the door of the court house of his county a list of the names and of the amount given him in payment by the sheriff of his county for the years county revenue and levy to the end, that each one may see if the sheriff has accounted with the Treasurer for the exact sum he has received from each individual and the said Treasurer shall copy the same in a fair legible hand in alphabetical order and receive therefor out of the county Treasury the sum of ten dollars.

SEC. 7. Be it further enacted that it shall be the duty of the clerk of the county court for each county immediately after the assessment made of the county levy and revenue to put up at the court house door of the county, the assessment of the rates of all property made by the court to the end that the public may know the sum that they are bound to pay to the collector of the county. And the respective clerks shall receive for their copies of said list the sum of two dollars out of the county Treasury.

SEC. 8. Be it further enacted that it shall be the duty of the Territorial attorney to prosecute for each county for all failures of duty arising under this act and for every prosecution had under the act against any sheriff or Treasurer there shall for his fee be taxed in a bill of costs the same sum that is or may be allowed on indictments

or presentments.

SEC. 9. Be it further enacted That the respective treasurers of the counties shall at the first county court in each county make out and deliver to each sheriff a number of Blanks certificates of every description belonging to the county revenue of the same nature that the sheriffs were by law authorised to grant and take receipts for the same, from the sheriffs who shall be entitled to a discount in his settlement with the Treasurer on all he may return of such Blanks.

SEC. 10. Be it further enacted that the Treasurers to be appointed under and by virtue of this act shall be entitled to the sum of ten dollars annually as a compensation for Books and stationary necessary to the said office

SEC. 11. Be it further enacted that the said Treasurers shall in their respective counties hereafter perform all the duties required by law of commissioners for taking in a list of taxable property and that in future no commissioners shall be appointed for that purpose, But such Treasurer shall have the same compensation therefor, as county commissioners have hitherto had.

RISDON MOORE

Speaker of the House of Representatives

PIERRE MENARD

president of the Council

Approved Dec 24. 1814

NINIAN EDWARDS

AN ACT to amend an act entitled "An act for levying and collecting a Tax on land

SEC. 1. Be it enacted by the Legislative council and house of Representatives and it is hereby enacted by the authority of the same. That it shall be the duty of the Territorial auditor, and he is hereby authorised and empowered to apply for and procure from the proper offices, an Abstract of all the entries and locations and purchases made by individuals from the U. States of lands in the several counties in this Territory, noting where and on what creeks or water courses in what range Township section and quarter section, such entried and locations and purchases have been made with the names of the persons for whom entered and located and by whom purchased from the United States, and it shall be the duty of the Auditor to transmit the said abstracts as is directed by the act to which this is a supplement

SEC. 2. Be it further enacted. That all the aforesaid lands shall be taxed as follows (viz.). If located entered or purchased in the Mississippi, Ohio or Wabash Bottoms the same shall pay at the rate of one dollar per hundred acres all other located, entered or purchased as aforesaid in any other place except the Mississippi, Ohio & Wabash bottoms, shall pay at the rate of seventy-five cents per hundred acres, and all unlocated confirmed claims, shall pay at the rate of thirty-seven and a half cents per hundred acres.

SEC. 3. Be it further enacted. That the commissioners to be appointed for the respective counties, shall not enter upon the duties of his office, before the first day of the month of July, yearly and every year and it shall be their duty to finish taking in the lists aforesaid by the first day of the month of August yearly and every year, and within six days thereafter shall make return of the same to the clerk of the county court of his county, who shall make out two fair copies of the same one of which he shall deliver to the sheriff and the other he shall transmit to the auditor of public accounts within ten days thereafter, retaining the original in his office, which original or copies thereof shall be admitted as Testimony in any court of Record within this Territory

SEC. 4. Be it further enacted, That each sheriff shall have power and it shall be his duty to demand of every inhabitant of his county, the amount of tax due by him, her or them for their lands, either personally or by leaving a notice at his or their usual or last place of residence on or before, the first day of the month of October, yearly and every year.

SEC. 5. Be it further enacted that the sheriff of each county respectively, shall on or before the first day of the month of December, yearly and every year pay to the Territorial Treasurer the whole amount of the taxed collected by them on land, which shall go to defray the territorial expenses and the said sheriff shall settle with the auditor for all delinquences and for all lands which could not sell, who is authorised to give them credit for the same.

SEC. 6. Be it further enacted That the commissioners to be appointed under the act to which this is an amendment, may advertise in the respective Townships of their counties if their be any, that he will on a certain day not less than ten days thereafter attend at some place in each Township if there be any otherwise at some place that he may suppose convenient to the inhabitants, for the purpose of

receiving from the inhabitants of his county their lists of lands according to law, and such persons are hereby required to attend at such places as said Commissioner may appoint as aforesaid—

SEC. 7. That in all cases where-ever any person may have any doubts as to the original claimant of the land which he is required to list for taxation, such person shall in lieu thereof be authorised to state the number of the survey under which such person claims.

RISDON MOORE

Speaker of the House of Representatives

PIERRE MENARD

Approved Dec 24. 1814

president of the Council

NINIAN EDWARDS

AN ACT to promote retaliation upon hostile Indians

Whereas the hostile incursions of the savages and their indiscriminate slaughters of men women and children, have been often repeated and under circumstances aggravating the honor of such sanguinary scenes, and producing great affliction and distress among the inhabitants of this Territory.

And whereas nothing is so well calculated to check the progress or prevent the repetition of those attacks on the part of those blood thirsty monsters as successful pursuit and retaliation upon them to effect which it becomes expedient to offer sufficient encouragement to the bravery and enterprize of our fellow-citizens, and those other persons now engaged or that hereafter may be engaged in the defence of our frontiers. Therefore

SEC. 1. Be it enacted by the Legislative Council and house of Representatives and it is hereby enacted by the authority of the same. That if any indian or indians shall hereafter make an incursion into our settlements with hostile intentions and shall commit any murder or depredation, and any citizen or citizens or rangers or other persons engaged in the defence of our frontier shall pursue and overtake and take prisoner or rprisoners or kill any indian or indians that may have so offended such person or persons shall if they be citizens merely receive a reward for each Indian so taken or Killed the sum of fifty dollars and if they be rangers or other persons actually at the time engaged in the defence of any frontier such person or persons shall be entitled to a reward of twenty five dollars.

SEC. 2. Be it further enacted that if any party of citizens having

first obtained permission of the commanding officer on our frontier to go into the Territory of any hostile indians shall perform any such tour and shall kill any indian warrior, or take prisoner any squaw or child in the country of said hostile Indians such person shall be entitled to a reward of one hundred dollars for each indian warrior Killed and such squaw or child taken prisoner

SEC. 3. Be it further enacted that if any party of Rangers or other persons now engaged or that may hereafter be engaged in the defence of our frontier, not exceeding fifteen in number shall with the leave of the officer make a voluntary incursion into the country of any hostile indians and shall Kill any indian warrior or warriors. or take and bring away any squaw or squaws child or children, in and from the country of said Indians such persons as aforesaid shall be entitled to a reward of fifty dollars, for each indian warrior Killed as aforesaid, and each squaw or child so taken prisoner

SEC. 4. Be it further enacted, that proof of any of the before mentioned facts to entitle any person or persons to the reward given by this law, shall be made before the Judges of any county court, or any two of said Judges who upon full proof being made before them, shall certify the same to the auditor of public accounts who shall audit the amount due to such person or persons and give to him or them a warrant on the Treasurer for the amount thereof which shall be paid out of any money in the public Treasury. This act shall be in force from and after the passage thereof.

RISDON MOORE

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved Dec 24. 1814

NINIAN EDWARDS

AN ACT providing for the payment of the expenses of revising and printing the laws of Illinois Territory

Whereas this Legislature have contracted with Nathaniel Pope Esq for revising the laws of this Territory making an index to the same, and superintending the printing thereof, and whereas also they have contracted with Matthew Duncan Esq for the aforesaid printing

Be it enacted by the Legislative Council and house of Representatives, and it is hereby enacted by the authority of the same that as soon as the above mentioned work shall be done and performed it shall

be the duty of the auditor to issue his warrant to the aforesaid Nathaniel Pope Esq for three hundred dollars and the said auditor shall settle liquidate and audit the account of said Matthew Duncan Esq. according to his bond given to the Governor of the Territory, and give to him a warrant for the amount of the same both of which warrants shall be paid out of any money in the Treasury.

RISDON MOORE

Speaker of the House of Representatives

PIERRE MENARD

pr of the Councill

Approved Dec 24. 1814

NINIAN EDWARDS

*AN ACT to make appropriations for the ensuing year
and other purposes*

SEC. 1. Be it enacted by the Legislative Council and house of Representatives of the Illinois Territory, That the sum of one hundred dollars is hereby appropriated to defray contingent expences for the year one thousand eight hundred and fifteen and that all monies which may be received into the Territorial treasury during the year 1815 except as above appropriated for contingent expences shall be a general fund for all monies allowed by law. The said sum of one hundred dollars allowed for contingent expences shall be subject to the orders of the Governor on the auditor for the payment of express and allowances which may be necessary and unforeseen, and unprovided for by the Legislature and for distributing the laws. A statement of which shall be laid by the Governor and Auditor before the Legislature at its next session.

SEC. 2. Be it further enacted that there shall be paid out of the Territorial Treasury on the warrant of the auditor to each member of the Legislative Council and house of Representatives the sum of three dollars per day for each days atetndance of the present session of the Legislature and at the rate of three dollars for every twenty miles travel to and from the seat of the Government to their places of residence by the most usual road. To the secretary of the Legislative Council and the clerk of the house of Representatives for their services at the present session the sum of three dollars and fifty cents per day each, and to the enrolling and engrossing clerk the sum of three dollars and fifty cents per day and to the door keeper of both

houses the sum of two dollars per day for every days attendance at the present session.

SEC. 3. Be it further enacted that the compensation which may be due to the members and officers of the Legislative Council shall be certified by the secretary thereof and the secretary's by the president thereof and those that may be due to the members and officers of the House of Representatives including the engrossing and Enrolling Clerk and door Keeper shall be certified by the clerk thereof, and the clerk's by the speaker, which certificate shall be sufficient evidence to the auditor of the claim, and he shall thereupon issue to such person so entitled a warrant or warrants on the Territorial Treasury for the amount of his certificate which warrant shall bear interest from the date thereof until paid at the Treasury.

SEC. 4. Be it further enacted that the following shall continue for one year commencing the first day of January next to be the salaries of certain officers as follows (to wit) For the two attorneys prosecuting for the Territory one hundred and fifty dollars each to the auditor of public accounts two hundred and fifty dollars, for the territorial Treasurer, one hundred & fifty dollars. For the adjutant General one hundred dollars.

SEC. 5. Be it further enacted that there shall be allowed and paid out of the general fund to the following persons the following sums of money, (viz) To James Gilbreath for fire wood and house rent one dollar and twenty-five cents per day. During the present session. To William Arundel for stationary furnished at the the present session sixteen dollars & fifty cents. to Hugh H. Maxwell for two candlesticks two dollars. To Matthew Duncan for printing the Governors Message and answer thereto thirty dollars To Thomas Stuart for articles furnished at this session two dollras and eighty and a fourth cents. To Wm Mears as attorney General in addition to his salary for Eighteen hundred and fourteen fifty dollars. To Hugh H Maxwell for sundry Stationary twenty three dollars and forty two and a half cents. To Matthew Duncan for Public printing one hundred and seventy seven dollars & twenty five cents For postage paid for the Territory for Governor Edwards—three dollars & fifty cents.

RISDON MOORE

Speaker of the House of Representatives

PIERRE MENARD

president of The Council

Approved Dec 24. 1814

NINIAN EDWARDS

A RESOLUTION *for depositing and distributing the Laws of this Territory.*

Resolved by the Legislative Council and House of Representatives of the Illinois Territory, that the Laws of this Territory that now are or that may hereafter be printed shall be deposited in the office of the Secretary of this Territory, & be by him distributed into the respective counties as is or may be directed by law.

RISDON MOORE

Speaker of the House of Representatives

Approved Dec. 14. 1814

PIERRE MENARD

NINIAN EDWARDS

president if the Council

Whereas it is necessary that the laws of this Territory should be printed with all possible dispatch for the information of the good citizens thereof

And whereas a revision of the same would greatly lessen the expense of the publication thereof, and marginal notes and a good index thereto would be desirable and convenient, Therefore be it Resolved by the Legislative council and house of Representatives that it is expedient to procure some person to revise and prepare said laws for publication and to deliver the same to the public printer as fast as he can print them, and also to prepare an index and marginal notes to be annexed thereto.

RISDON MOORE

Speaker of the House of Representatives

PIERRE MENARD

Approved Dec 24, 1814

president of The Council

Resolved by the Legislative Council and house of Representatives That the Journals of each house with all documents connected therewith shall be deposited in the office of the Secretary of the Territory who shall be authorized to purchase a press to Keep the same in a secure manner for the amount of which the auditor shall issue a warrant which shall be paid by the Treasurer and all papers belonging to him as Secretary of the Territory.

RISDON MOORE

Speaker of the House of Representatives

Approved Dec 24. 1814

PIERRE MENARD

NINIAN EDWARDS

President of the Council

LAWS

PASSED

BY

THE LEGISLATIVE COUNCIL,

AND

HOUSE OF REPRESENTATIVES,

OF

ILLINOIS TERRITORY,

AT

THEIR FOURTH SESSION,

HELD

AT KASKASKIA,

1815-'16.

KASKASKIA:

PRINTED BY

MATTHEW DUNCAN

PRINTER TO THE TERRITORY.

1816.

[Reprinted from the first edition.]

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*This refers to the paging of the original edition.

LAWS OF ILLINOIS TERRITORY,

Enacted in 1815 & '16.

AN ACT for the division of Gallatin County.

SEC. 1. Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory, and it is hereby enacted by the authority of the same, That all that tract of Country within the following boundaries, (to wit,) beginning at the mouth of the little Wabash running up the same to Joseph Boon's mill, thence due West to the third principal meridian, thence North to the South East corner of Edwards County, thence with Edwards County line East to the Big Wabash, thence down the same to the beginning; shall constitute a separate County to be called White; and for the purpose of fixing the permanent seat of Justice for the said county the following persons be appointed commissioners (to wit,) James Ratliff, Benjamin White, Samuel Hay, Thomas E. Craig and Stephen Hog, which said commissioners or a majority of them being duly sworn before some Judge or Justice, of the Peace in this Territory to faithfully take into view the situation of the settlement, the geography of the county; the convenience of the people and the eligibility of the place, shall meet on the first Monday in February next at the house of Lowmy Hay on the little Wabash and proceed to examine and determine on the place for the permanent seat of Justice and designate the same; provided the proprietor or proprietors of the land shall give to the said county for the purpose of erecting public buildings a quantity of land at the said place not less than twenty acres to be laid off into lots and sold for the above purpose; But should the said proprietor or proprietors refuse or neglect to make the donation aforesaid, then and in that case it shall be the duty of the commissioners to fix upon some other place for the seat of Justice as convenient as may be to the different settlements in said county, which place fixed and determined on the said commissioners shall certify under their hands and seals and return the same to the next county court in the county aforesaid, and as compensation for their services they shall each be allowed two dollars for every day they may be necessarily employed in fixing the aforesaid seat of Justice to be paid out of the county levy, which said court shall cause an entry thereof to be made on their records; and untill the public buildings

may be fixed the courts shall be holden at the house of Lowny Hay on the little Wabash.

SEC. 2. Be it further enacted, That it shall and may be lawful for the Governor of this territory immediately to constitute the militia within the county thus laid off into one regiment, the commanding officer of which shall have the same power to order out the militia as is now possessed by the Lieutenant Colonel of the respective regiments.

SEC. 3. And be it further enacted, That the said county of White is hereby allowed one representative in the House of representatives of this territory, who shall be elected agreeably to law and be entitled to all the immunities powers and privileges prescribed by law to members of the House of Representatives.

SEC. 4. Be it further enacted, That whereas the Counties of Gallatin Edwards and White compose one district for the purpose of electing a member of Legislative Council, the citizens of the said county entitled to vote may at any election for a member of the Legislative Council to represent said district proceed to vote for such member, and it shall moreover be the duty of the Sheriff of the said county of White within ten days after the close of said election to attend at the court house of the county of Gallatin with a statement of the votes given in said county of White to compare the polls of the respective counties and to join with the sheriff of Gallatin and Edwards counties in making out and delivering to the person duly elected a certificate thereof, and for a failure thereof he shall forfeit and pay the same penalties and for the same purposes that the sheriffs of Gallatin and Edwards are subject.

SEC. 5. Be it further enacted, That the citizens of the said county of White are hereby declared to be entitled in all respects to the same right and privilege in the election of a Delegate to Congress as well as of a member to the House of Representatives of the Territory that are allowed by law to the other counties of this territory, and all elections are to be conducted at the same times and in the same manner as is provided for other counties.

This act to be in force from and after the first day of February next.

RISDON MOORE

Speaker of the house of representatives,

Approved this 9th Decr. 1815

PIERRE MENARD

NINIAN EDWARDS.

President of the Council.

AN ACT to authorise the County Court of Gallatin County to grant an additional Ferry at Shawnoetown.

Whereas it appears to this Legislature, That doubts have arisen, whether the county court of Gallatin County are authorised, under the present existing laws, to grant Ferries at Shawnoetown, in consequence of the margin of the Ohio being according to the plan of said said Town, public ground and unappropriated to any individual.

Be it therefore enacted by the Legislative Council and House of Representatives; and it is hereby enacted by the authority of the same; That the county court of Gallatin be and they are hereby authorised to grant one more ferry at the above place, if they conceive the public good requires it, (the applicant complying with the law in all respects as are required by other applicants for Ferries in this territory.)

RISDON MOORE

Speaker of the House of Representatives,

PIERRE MENARD

President of the Council,

Approved Decr. 18, 1815,

NINIAN EDWARDS.

AN ACT for the relief of persons, that have violated the law respecting Dueling.

Whereas the law entitled “An act to suppress duelling was never published in this territory, untill the publication of the late revision of the laws of this territory, and many therefore remained ignorant of the law, whereby sundry violations of it have taken place, and the violators deprived of their eligibility to hold any office in the territory according to the operation thereof: For remedy whereof.

Be it enacted by the Legislative Council & House of Representatives, and it is hereby enacted by the authority of the same; That when any person shall hereafter received any appointment to any office, either civil or military, in this territory. That the oath prescribed in the act entitled “An act to suppress dueling” shall apply to the time of the passage of this act, and not to that, to which this is a supplement, and that no violation of said law which happened previous to the passage of this act shall work a disqualification. That

this act to take effect and be in force from and after the paassage thereof.

RISDON MOORE

Speaker of the House of Representatives,

PIERE MENARD

President of the Council,

Approved Decr. 18, 1815.

NINIAN EDWARDS.

AN ACT directing the mode of changing the venue.

SEC. 1. Be it enacted by the Legislative Council and House of Representatives of the Territory of Illinois and it is hereby enacted by the authority of the same: That all actions now depending or hereafter may be instituted in any court of Records within this Territory, where either of the parties in the suit shall fear, that he, she or they, will not receive a fair trial in the court, where it is pending, owing to the interest or prejudice of the Judge or Judges of the court, where the suit is pending, or that the sheriff or coroner is interested or prejudiced, or that the adversary of the person has undue influence over the minds of the citizens of the county, where the suit is pending, or that the person applying is so unfortunate, that he does not expect a fair trial, or that his defense is odious (tho' legal,) it shall be lawful for the said party to petition the Judge of the court aforesaid, where, the cause or action may be pending, for a change of venue for the said cause, distinctly setting forth the cause of bar, that he will not receive a fair trial, and supported by his or her affidavit, on which the Judge of the court shall, under his hand, award a change of the vene, and order the Clerk of the court, where the suit is depending, to send forward the papers, in the suit, by some fit person, whom the Clerk shall employ, to such Court, having jurisdiction in similar cases, as the Judge may direct, and the Clerk of such Court shall receive them, and give a receipt for them, and docket the suit in order, and the Court shall have full power and jurisdiction to award suboenas for witnesses, to inforce their attendance, to grant commissions for taking depositions, to hear and determine the said controversy, to award execution and to do every thing relative thereto which the Court, from whence the cause was removed, might or could have done.

SEC. 2. Be it further enacted, That any person convicted of taking

a false oath, when swearing to the truth of the allegation, shall be perjured and suffer accordingly: *Provided*, that no Judge, Sheriff or Coroner, charged as aforesaid, or adversary in the cause, shall be admitted as a witness against the petitioner.

SEC. 3. Be it further enacted, That the expence attending the record of such suit shall be paid by the petitioner, and taxed in the bill of costs at the determination of the suit, should he succeed, the person, who conveys the papers shall have six cents for every mile that he shall necessarily travel in going to and returning from the Clerks Office, which shall be paid to the Clerk before the papers leave the Office.

SEC. 4. Be it further enacted; That the Clerk shall be answerable for the fidelity of the person, he employes to transport the papers from his office, but not for unavoidable accidents.

SEC. 5. And be it further enacted; That the venue in no case shall be changed unless the petitioner deposits the order of the Judge together with the petition and affidavit aforesaid, which shall be carefully preserved by the Clerk and the necessary expences attending the removal, with the Clerk having custody of the papers at least thirty days before the court, to which the said suit shall be set for trial. This act to commence and be in force from and after the passage thereof.

RISDON MOORE

Speaker of the House of Representatives

PIERRE MENARD

President of the Council

Approved, Dec. 21st 1815,

NINIAN EDWARDS.

AN ACT to amend an act entitled “*An act to regulate the disposition of water crafts found gone or going adrift and of estray animals.*”

SEC. 1. Be it enacted by the Legislative Council and House of Representative of the Illinois Territory and it is hereby enacted by the authority of the same; That if the owner or owners of any stray Horse, Mare, Colt, Mule or Ass or any neat cattle taken up under the provisions of the aforesaid receited act shall not appear within two years after the publication required in the said act, and prove his, her or their property then and in that case the property shall be vested in the taker up; provided nevertheless, that nothing in this act shall be so construed as to prevent the lawful owner or owners of any estray or estrays as aforesaid from proving his, her or their property

at any time after the expiration of the said two years but it shall be at the option of the taker up either to deliver the estray or pay the amount of the appraisment after deducting the necessary expence of taking up and also reasonable charges for keeping such estray or estrays; But if such taker up shall make use of any estray horse or horses, mares or mules by working him or them, in such case he shall not be entitled to any pay for keeping any such estray.

SEC. 2. Be it further enacted; That if any person or persons, who shall hereafter take up any estray hog, sheep or goat, and do therewith as the law requires, the property of such estray shall be vested in the said taker up after the expiration of one year (if no owners shall appear and prove their property within that time;) but in case the owners of such stray shall appear and prove their property after the expiration of one year, it shall be optional with the taker up to deliver to the said owners the said estray, or pay the amount of the appraisment thereof after paying the necessary expences.

SEC. 3. Be it further enacted, That any person taking up any estray Horse, mare, mule or colt shall within two months after the same is appraised, *Provided*, the owner shall not claim his property during the said term of two months, transmit to the public printer of this Territory a particular description of such estray or estrays, and the appraisment thereof, together with the name of the County and place of residence of said taker up, certified by the Clerk of the County or Justice before whom such estray was appraised, to be advertised three weeks in his paper, for which the said printer may demand thirty seven and one half cents for the first insertion, and eighteen and three fourth cents for every time afterwards, and when there shall be two or more estrays in the same advertisement, such printer shall not demand more than one half the sum for such additional estray or estrays or each of them as is allowed for one.

SEC. 4. And be it further enacted; That all and every part of the aforesaid recited act coming within the perview of this act shall be and the same is hereby repealed. This act to take effect from and after the fifteenth day of February next.

RISDON MOORE

Speaker of the House of Representatives,

PIERRE MENARD,

President of the Council.

Approved Decr. 30, 1815.

NINIAN EDWARDS.

AN ACT reforming certain rules of legal Constitution.

Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory, and it is hereby enacted by the authority of the same; That whenever any law, which has repealed another, shall be itself repealed, the former law shall not be revived without express words to that effect; This act to be in force from and after the passage hereof.

RISDON MOORE.

Speaker of the House of Representatives,

PIERRE MENARD,

President of the Council.

Approved Decr. 30, 1815,

NINIAN EDWARDS.

AN ACT to encourage the killing of Wolves:

Whereas the raising of sheep ought to be encouraged by every possible means, and as the distruction of Wolves would greatly tend to so desirable an object.

SEC. 1. Be it therefore enacted by the Legislative Council and House of Representatives of the Illinois Tearitory and it is hereby enacted by the authority of the same, That every person within this Territory of the age of ten years and upwards, who shall kill anywolf within six miles of any of the settlements in any County within this Territory, shall receive fifty cents for every wolf, he shall kill, not exceeding six months old to be adjudged of by the Justice before whom the head or scalp thereof, shall be taken, and for every wolf of the age of six months and upwards, seventy five cents.

SEC. 2. Be it further enacted, That every person, claiming such reward, shall produce the head or heads, scalp or scalps (if more than one) with the ears entire, to a Justice of the Peace of the county, where such wolf was killed, who shall administer to such person the following oath, viz. I———do solemnly swear or affirm (as the case may be) that the head or heads scalp or scalps (as the case may be) now produced by me is the head or scalp of a wild wolf taken and killed by me in the County of——— within six miles of some one of the settlements within the same, to the best of my knowledge, and that I have not wittingly or willingly spared the life of any bitch wolf, in my power to kill, with a design of encreasing the breed so help

me God.”— and every Justice before he administers the foregoing oath, shall first read it to the person wishing to receive the same, and also the fourth section of this law; and every Justice, to whom such head or scalp shall be produced, is hereby empowered and required to administer the foregoing oath, and thereupon grant the killer a certificate, reciting his name, the number of heads or scalps, and whether they be under or over six months old, the time and place they were killed, which certificate being produced to the County Court, who are hereby authorised and required to give such person an order on the County Treasurer for the amount, to which he or they may be entitled.

SEC. 3. Be it further enacted; That any Justice, having wolves heads or scalps brought before him shall have the ears cut off in his presence.

SEC. 4. Be it further enacted; That if any person or persons shall receive any reward contrary to the true intent and meaning of this act, the person or persons, so offending, shall forfeit and pay any sum not exceeding thirty dollars, to be recovered by action of debt, qui tam or by indictment, for the use of the county, before any court having Jurisdiction thereof.

SEC. 5. And be it further enacted, That all Justices of the peace are hereby required to administer the oath and grant the certificate herein mentioned, as above required as necessary and incidental to his office, without fee.—This act shall commence and be in force from and after the passage thereof.

RISDON MOORE,
Speaker of the House of Representatives.
PIERRE MENARD.
President of the Council.

Approved, Decr. 30th 1815.

NINIAN EDWARDS.

*AN ACT to amend the law now in force directing the mode of
summoning and impanelling grand Juries.*

Be it enacted by the Legislative Council and house of Representatives of the Illinois Territory and it is hereby enacted by the authority of the same, That where the Grand Juries, which may be summoned to attend any of the Circuit Courts in this Territory, shall be discharged, and the said Court at any time thereafter, during the said term, shall think it necessary to have empannelled another Grand

Jury, they shall have power and authority to do so, and for that purpose shall enter an order on Record, directing the Sheriff to summon a sufficient number of qualified persons to constitute a Grand Jury, to meet and attend at such time as the Court shall direct, upon which said order the Sheriff shall proceed immediately to summon a Grand Jury to meet at the time directed by said order of Court, which said Grand Jury, so summoned, being duly empannelled shall have all the powers and be subject and governed by the same rules regulations and laws as Grand Juries heretofore have been, and their proceedings shall be as effectual and binding to all intents and purposes as though done by a Grand Jury summoned under the law now in force. This act shall be in force from and after the passage thereof.

RISDON MOORE,
Speaker of the House of Representatives,
PIERRE MENARD,
President of the Council.

Approved Decr. 30, 1815.

NINIAN EDWARDS.

*AN ACT providing for the collection of the land tax in the counties
Gallatin and Edwards for the year 1815.*

Whereas it is represented to the General assembly that the county commissioners list of land subject to taxation in the counties of Gallatin and Edwards were not put into the hands of the present sheriffs of said counties within the time prescribed by law, and that the same has not been collected, for remedy whereof:

SEC. 1. Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory, and it is hereby enacted by the authority of the same, That the sheriffs of Gallatin and Edwards counties shall be, and they are hereby authorised and required to collect the taxes on land in the said counties for the year 1815, from the several persons charged therewith agreeably to their respective county commissioners lists, and it shall be their duty to settle with the Auditor and pay the proceeds in to the treasury on or before the first day of May next, and in case of failure, they shall be subject to be proceeded against by the Auditor in the same manner as if the lists had been put into their hands within the time prescribed by law.

SEC. 2. Be it further enacted, That it shall be the duty of the clerks of the county courts for the said counties of Gallatin and

Edwards, to cause to be transmitted to the Auditors office on or before the first day of March next a transcript of the county commissioners lists of land subject to taxation in their respective counties for the year 1815, and they shall be allowed the same compensation for their services, as if the same had been made within the time required by law, and in case of their failure to comply with the requisitions of this section, they shall incur the same penalties as are provided by law for failing to make out annual transcripts within the time prescribed by law.

SEC. 3. Be it further enacted, That it shall be lawful for the sheriff of Gallatin county to collect the arrearages of taxes in the counties of White and Pope in the same manner as if the said White and Pope counties had not been established. This act to be in force from its passage.

RISDON MOORE

Speaker of the House of Representatives

PIERRE MENARD

President of the Council.

Approved Jan. 4, 1816.

NINIAN EDWARDS.

*AN ACT to provide a compensation for the Sheriff in the
Court of Appeals.*

Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory, and it is hereby enacted by the authority of the same; That the sheriff attending the Court of Appeals shall receive, for his attendance, the sum of one dollar for each suit, that shall be decided in said court which shall be taxed in the bill of costs, and paid by the unsuccessful party and recorved in the same manner, that the clerks fees are, and he shall receive the same fees for similar services, that the sheriffs receive for their services in the circuit courts. This act to take effect from and after the passage thereof.

RISDON MOORE.

Speaker of the House of Representatives.

PIERRE MENARD

President of the Council.

Approved Jany. 4, 1816.

NINIAN EDWARDS.

AN ACT to amend the "*Act concerning the Militia*," passed the 14, day of December one thousand eight hundred and fourteen.

Whereas by the militia law many persons may be fined by courts martial, who may be unable to attend and make their lawful excuse, and much injury may result to the good people of this Territory for remedy whereof.

SEC. 1 Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory, and it is hereby enacted by the authority of the same, That hereafter whensoever any person or persons shall have been thus grievously fined it shall be lawful for those upon receiving notice from the sheriff of such fine having been assessed to notify the sheriff of his or their intention to appear at the next Battallion or Regimental court Martial and the sheriff is hereby required to suspend the collection of said fine untill after the next Battallion or regimental court Martial.

SEC. 2. Be it further enacted, That it shall be the duty of any person appealing to any subsequent Court Martial for the remission of a fine to obtain a certificate of such remission from the court Martial remitting the same, which said certificate shall be received by the sheriff in payment of the fine and the Auditor is hereby required to credit the sheriff with the same upon the delivery of the aforesaid certificate. This act to commence and be in force from and after the passage thereof.

RISDON MOORE

Speaker of the House of Representatives,

PIERRE MENARD

President of the Council,

Approved Jan. 4, 1816.

NINIAN EDWARDS.

AN ACT for forming a new county out of Randolph and St. Clair counties.

SEC. 1. Be it enacted by the Legislative Council and House of Representative of the Illinois Territory and it is hereby enacted by the authority of the same; That all that part of the country within the following bounds, viz, Beginning on the Mississippi River where the base line, which is about three fourths of a mile below Judge

Biggs' present residence strikes the said River, thence with the base line untill it strikes the first township line therefrom, thence S.E. to the S.E. corner of township two, south range, nine West, thence south to the south East corner of township four, south range nine West, thence south Westwardly to the Mississippi so as to include Alexander M'Nabb's farm, and thence up the Mississippi to the beginning, shall constitute a separate county to be called Monroe.

SEC. 2. Be it further enacted, That William Alexander, James Lemon senr. James B. Moore, John Prim, and James M'Roberts, be, and they are hereby appointed commissioners to fix upon the proper place for the seat of Justice for said county of Monroe, who shall meet for that purpose, on the third Monday of July next at the town of Harrison and they, or a majority of them, when so assembled together, shall take an oath to fix the said seat of justice at such place as they shall think best calculated to promote the convenience, and interest of said county without favour or affection to any individual or individuals, provided the owner or owners of the land will give to the county for the purpose of erecting public buildings, a parcell of land at the said place, not less than twenty acres, and laid off into lots and sold for the above purpose, but should said owner or owners refuse to make said donation aforesaid, then and in that case it shall be the duty of the commissioners to fix upon some other place for the seat of Justice as convenient as may be the different settlements in said county, and when fixed upon by said commissioners they shall certify under their hands and seals, and return the same to the next county court in the county, which said court shall cause an entry thereof to be made on their records of the said court. Provided however, that if the said commissioners or a majority of them, shall not be able to meet on the said third Monday in July next they shall meet as soon thereafter as it may be convenient, and either at the first or any subsequent meeting they may continue from day to day so long as they may think it necessary to form a correct decision; and said commissioners shall be entitled to two dollars each per day that they are necessarily employed in fixing the county seat, to be paid out of their county levy; and provided also, that the town of Harrison shall be the seat of Justice for said county until some other place shall be chosen as aforesaid and public buildings be erected thereon.

SEC. 3. Be it further enacted, That the said county of Monroe shall be, and hereby is allowed one representative in the House of

Representatives of this territory, who shall be elected in the same manner that Representatives are now authorised by law to be elected in other counties, and he shall be authorised to exercise all the powers, possess all the privileges, and be entitled to all the emoluments that any other Representative can exercise possess or receive according to law.

SEC. 4. Be it further enacted, That whereas the said county of Monroe was taken off of two districts for the election of Members of Council, all qualified voters who shall reside within those bounds which previous to the passage hereof was a part of St. Clair county, shall have a right to vote for a member of the Legislative Council to represent them and the qualified voters of St. Clair county as one district; and all those qualified voters who shall reside within those bounds, which previous to the passage hereof, was a part of Randolph county shall have a right to vote for a member of the Legislative council to represent them, and the qualified voters of Randolph county as one district, and it shall be the duty of the Sheriffs of the counties of Monroe and St. Clair within eight days after the election to attend at Bellville and compare the polls and make out and deliver to the person duly elected for that district their joint certificate thereof; And it shall be the duty of the said sheriffs of Randolph and Monroe to attend at Kaskaskia within ten days after the election, to compare the polls and make out and deliver to the person duly elected for that district their joint certificate thereof, provided however, that any part of the said duty may be performed by a legally authorised deputy sheriff, the principal sheriff being responsible for the faithful discharge thereof, and if the said sheriff, or any of them shall refuse or fail to perform the duties hereby required, such delinquent, or delinquents, shall severally forfeit and pay the sum of two hundred dollars to be recovered by action of debt or indictment one half to the use of the territory and the other half to the person suing or prosecuting for the same.

SEC. 5. Be it further enacted, That the qualified voters in said county of Monroe shall be entitled in all respects to the same rights and privileges in the election of a delegate to Congress, that are allowed by law to the qualified voters of any other county; and all elections hereby authorised, shall be held at the seat of Justice for the said county of Monroe, and shall in all respects be held and conducted as elections are authorised and required to be held and con-

ducted in other counties. This law to commence and be in force from and after the first day of June next.

RISDON MOORE,
Speaker of the House of Representatives.
PIERRE MENARD.
President of the Council.

Approved, Jan. 6th 1816.
NINIAN EDWARDS.

*AN ACT for the relief of Hezekiah West Treasurer of the
County of Johnson.*

Whereas it has been represented to this Legislature, that the said Hezekiah West treasurer of the said County of Johnson commenced and finished listing the taxable property in said County in the year 1815 before the law authorised him to do the same, in consequence of which the County Court of said County refuse to receive the said lists of taxable property, for remedy whereof.

Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory, and it is hereby enacted by the authority of the same; That the lists so taken shall be as valid in all respects as if they had been taken in agreeably to the existing laws, and that the county court of Johnson County shall be compelled to receive the said list, at the first court hereafter to be held for said county under the same rules and regulations, as if they had been taken in, in proper time, any law to the contrary notwithstanding; And the sheirff of Johnson County is hereby authorised and required to proceed to collect the taxes in said County, and that further time untill May next be given him to make his settlements for said taxes, and the said sheriff is hereby authorised to collect all taxes now due from the inhabitants included in the presant bounds of Johnson County, This law to take effect from and after the passage hereof.

RISDON MOORE,
Speaker of the House of Representatives,
PIERRE MENARD
President of the Council.

Approved Jany. 6, 1816.
NINIAN EDWARDS.

AN ACT increasing the jurisdiction of the County Courts.

SEC. 1. Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory and it is hereby enacted by the authority of the same, That the county courts of this territory shall hold four sessions annually, and shall have original jurisdiction of all demands for direct payment of money where the same shall be over twenty dollars and not exceeding one hundred dollars.

SEC. 2. Be it further enacted, That whenever hereafter any person or persons, shall hold any bill, bond promisory note, or instrument of writing in his her or their own right or assignee of any other person or persons or shall have an account or verbal contract for the direct payment of money, within the above specified amount, he, she or they may at any time after the same becomes due file the said bill, bond, promisory note, instrument of writing or account in the Clerk's office of the county court of that county in which the debtor or debtors or either of them may reside together with a petition in substance as follows.

County, to wit, A. B. plaintiff states that he holds a bond (or other instrument of writing as the case may be) or has an account on or against C. D. defendant (or defendants) in substance and to the effect following (here insert a copy of the note, other instrument of writing, or account as the case may be) & if there are any assignment or assignments on any such bond, note or other instrument of writing; they shall be set fourth as follows, to wit, on which note (bond or other instrument of writing as the case may be) there is the following assignment (or assignments,) to wit, (here set fourth the assignment or assignments) yet the said debt or account as the case may be, remains unpaid, wherefore the said plaintiff (or plaintiffs) prays judgment for his debt and damages, together with his costs &c."

Signed "A. B." plaintiff.

SEC. 3. Be it further enacted, That the clerks of the said court on the filing of said petition, shall issue a summons with the copy of said petition annexed thereto, commanding said defendant or defendants to appear on the first day of the succeeding term of said court and answer the said petition, or otherwise final judgment will be entered up against him by default, which said petition and summons shall be served on the defendant by delivering a copy thereof by the sheriff of said county to each of the defendants named therein, attested as a true copy of said petition and summons by the said

sheriff, and the sheriff shall return the original petition and summon to the clerks office from which it issued with an endorsement thereon of the execution thereof to the following effect (to wit) "Executed by delivering a true copy of the within petition and summons to the said C. D. on the day of " and if the defendant or defendants or any of them will not receive the said copy of the sheriff, in that case the sheriff shall read said petition and summons to the defendant or defendants in an audible voice, and throw down the copy thereof in the presence of the defendant or defendants, or if the defendant or defendants when informed by the sheriff that he has such petition and summons against him her or them, shall fly from the sheriff before he can have an opportunity of reading the same to him, her or them, in that case the sheriff shall leave said copy at the place where the defendant or defendants departed from, and return the truth of the case, endorsed on the petition and summons and in either of the last mentioned cases the petition and summons shall be considered as legally executed.

SEC. 4. Be it further enacted, That the clerk shall set the said petition on his docket for trial on the first day of the first term succeeding the filing thereof, and if it shall appear by the sheriffs return on the petition and summons that the same has been executed on the defendant or defendants or either of them at least ten days previous to the return thereof, the same shall stand for trial, in the order in which it is docketed, but if it has not been executed ten days before the return thereof, it shall be continued until the next term, unless both parties shall consent to the trial thereof at the term to which it is returned.

SEC. 5. Be it further enacted, That if on the calling of the cause any defendant or defendants on whom the petition and summons has been executed ten days before the return thereof, shall not appear, the court shall proceed to give judgment for debt, damages and costs against said defendant or defendants agreeably to the bill, bond, or other instrument of writing, or in the case of an account, for the amount thereof, it being first proven by legal testimony, unless the plaintiff or plaintiffs shall require a writ of enquiry which if so required shall be executed immediately by jurors to be taken from the by-standers. But if the defendant or defendants shall appear, he, she or they shall be at liberty to plead any plea which by law he or they could now do in any action of debt or assumpset

that goes to the real merit of the case, on which plea or pleas an issue shall be considered as joined; and that justice may not be entangled in a net of technical nicety, it is hereby explicitly declared that any testimony which goes to the real merits of the case may be admitted on such issue, & the jury thereupon shall be at liberty to give their verdicts for whatever may appear to them to be justly due to the plaintiff or plaintiffs. Provided however that nothing herein contained shall prevent the court from continuing said suit on good cause shewn.

SEC. 6. Be it further enacted, That if the petition and summons shall be returned not found an alias summons with a copy of the petition annexed may issue returnable to the first day of the next term without an order of the Court. Provided nothing herein shall prevent any plaintiff or plaintiffs from proceeding on to the final judgment against any defendant or defendants on whom the said petition and summons have been returned executed as aforesaid.

SEC. 7. Be it further enacted, That the clerk shall be entitled to fifty cents for issuing the summons, but no tax fee shall be charged thereon, and for all other services he may perform under this law, his fees shall be the same as are now allowed by law to any other clerks for similar services, and the sheriff shall receive fifty cents for executing said petition and summons on each and every defendant therein named, and twelve and a half cents for returning the same and for all other services he shall be entitled to the same fees as the law allows for similar services.

SEC. 8. Be it further enacted, That nothing in this act contained shall prevent any plaintiff or plaintiffs, from commencing his, her, or their action or actions on any bill, bond, note instrument of writing or account in the same manner that he, she or they might have done if this law had never been passed.

SEC. 9. Be it further enacted, That whenever one or more defendants shall reside in another ety, it shall be lawful for the plaintiff when he files his petition according to this law, to take out a summons with a copy of the petition as aforesaid directed to the sheriff of such other county to summons such other defendant or defendants to answer the said petition, or if it shall appear on the return of the first petition and summons that one or more of the defendants are found, the plaintiff may go on to judgment against the defendant or defendants on whom the petition and summons have been executed

and discontinue his suit to the other defendants or he may go on to trial against the defendant or defendants on whom the process has been executed and taken out an alias petition and summons against such defendants as have not been found directed to the sheriff of the county where such defendant or defendants or either of them may be or reside; and where such process shall have been returned executed, the plaintiff may proceed to judgment agreeably to the regulations aforesaid in the same manner as if no judgment had been given against the defendant or defendants on whom such process was first executed. But if the execution on the first judgment shall be returned satisfied, no execution except for costs shall issue on the second judgments, but if the first judgment, shall not be so satisfied or be but partly satisfied, execution may issue for the whole or such unsatisfied part on the said second judgment, and so may execution issue in the same manner on either of the said judgments until the whole amount of the debt damages and costs justly due has been collected and no more. Provided however, that but one execution on either of said judgments shall issue at once nor shall any new execution issue until the preceeding one has been returned, or until after the return day thereof, or the plaintiff or plaintiffs may continue the s'd cause until the process has been executed on all the defendants.

SEC. 10. Be it further enacted, That the clerk shall have six cents for filing the petition and the same fees for copying as are allowed by law for the same service.

SEC. 11. Be it further enacted, That executions may in all other respects issue and be executed and is provided in cases of judgments given by any other courts of common law in this territory.

SEC. 12. Be it further enacted That all powers necessary to the due execution of the duties hereby enjoined on the said county courts shall be and hereby are conferred on them respectively.

SEC. 13. Be it further enacted, That it shall and may be lawful for the governor of the territory to appoint all the judges of the respective county courts and all the clerks thereof during good behaviour for the term of three years from the date of their respective appointments.

This act to be in force from and after the passage thereof.

RISDON MOORE,

Speaker of the House of Representatives,

Approved Jan. 6, 1816.

NINIAN EDWARDS.

PIERRE MENARD,

President of the Council.

AN ACT *for relief of Julian Bart.*

Whereas it appears to this Legislature that Julian Bart was drafted to serve a tour of duty as a militia man under a legal requisition of the Government of the United States, during the past summer and that the said Bart while in service, and obeying the orders of his officer was most shockingly wounded, having one arm shot off the other broken in different places, his body lacerated, and his eye sight greatly injured, and now lies in a most distressed situation, in the Town of St. Louis dependent on the bounty of a poor family who are totally unable to provide the necessary comforts and accommodation for him, and whereas it would be cruel and unjust to permit him to linger out a miserable existence rendered so in the service of his Country without the support which it is able to afford him, therefore:

Be it enacted by the Legislative Council and house of Representatives of the Illinois Territory and it is hereby enacted by the authority of the same, that the gov. of this territory be, and is hereby authorised to apply to the auditor of this Territory for a warrant or warrants for such sum or sums as may from time to time become necessary for the support of the said Julian Bart and to provide for his removal from St. Louis to Kaskaskia, his place of residence. This act to commence and be in force from and after the passage thereof and to be in force untill the next sessoin of the Legislature.

RISDON MOORE

Speaker of the House of Representatives.

PIERRE MENARD

President of the Council.

Approved Jan. 9, 1816.

NINIAN EDWARDS.

AN ACT *explaining the Jurisdiction of the Circuit Courts
and for other purposes.*

SEC. 1. Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory, and it is hereby enacted by the authority of the same, That the Jurisdiction of the several Circuit Courts, shall remain, and extend to all parts of the Territory in which they had Jurisdiction on the first day of December 1815.

SEC. 2. Be it further enacted, That nothing contained in any law

passed at this session of the Legislature erecting and establishing any new County or Counties shall be construed so as to impair or infringe upon the power of the sheriffs of the Counties of Gallatin, Johnson, Randolph or St. Clair, from executing any process legally issuing from the respective Circuit Courts in any part of their respective Counties as they existed on the first day of December 1815.

SEC. 3. Be it further enacted, That all recognizances taken by a conservator of the Peace, for any offence of which the Circuit Courts have recognizance, shall be returned to the Circuit Court which had Jurisdiction on the first day of December 1815 over the place where the offence shall have been committed, and the said offender shall be committed to the Jail of the County in which the said Circuit Court shall hereafter be holden, if the offence be not bailable or if he refuse to give bail, and the said offender shall be tried in said county.

SEC. 4. Be it further enacted, That this act shall take effect from the passage hereof and remain in force untill a Circuit Court shall be organized in the new Counties or clerks of such Circuit Courts shall be appointed therein lawfully qualified to issue the necessary process and no longer.

RISDON MOORE,
Speaker of the House of Representatives,
PIERRE MENARD,
President of the Council.

Approved Jan. 9, 1816.
NINIAN EDWARDS.

AN ACT to amend an act entitled "An Act for levying and collecting a tax ou Billiard Tables.

SEC. 1. Be it enacted by the Legislative Cuuncil and House of Representatives of the Illinois Territory and it is hereby enacted by the authority of the same, That the annual tax on Billiard Tables shall hereafter be one hundred and fifty dollars, one hundred dollars to the use of the Territory and fifty dollars to the use of the county to be recovered in the same way as is directed by the act that was passed on the twenty second day of December eighteen hundred and fourteen for levying and collecting a tax on Billiard Tables, and subject to the same rules and regulations as are in the said recited acst.

SEC. 2. Be it further enacted, That all laws coming within the

perview of this act shall be, and the same are hereby repealed, This act to take effect from and after the passage hereof :

RISDON MOORE

Speaker of the House of Representatives,

PIERRE MENARD

President of the Council

Approved, Jan. 9, 1816,

NINIAN EDWARDS.

*AN ACT supplementary to an act entitled "An Act
establishing Ferries.*

SEC. 1. Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory, and it is hereby enacted by the authority of the same, That any owner, or occupier of a Ferry that is or may hereafter be established within this territory, shall be and they are hereby obliged to keep the banks of the River or water course at the place where such ferry is kept in such repair that waggons and teams may safely and conveniently pass; any person or persons owning or keeping a ferry legally established within this territory and neglecting or refusing to perform the duties required by this act, shall for every such offence, be subject to the same penalty as supervisors of public highways, are for neglect or omission of their duty, to be recovered in the same way as is pointed out in the law to recover fines from supervisors for neglect of their duty.

SEC. 2. Be it further enacted, That all Preachers of the Gospel, when going to and from preachingshall pass ferry free. This act to take effect from and after the first day of April next.

RISDON MOORE.

Speaker of the House of Representatives,

PIERRE MENARD

President of the Council.

Approved Jan. 9, 1816.

NINIAN EDWARDS.

*AN ACT authorising the Clerks of the several County Courts to
administer oaths to officers commissioned by the Governor.*

Whereas the existing law requiring that the Governor of the Territory shall administer oaths prescribed by law to all officers appointed under the authority of this government, or that he shall issue

a Dedimus potestatum, in such cases to some other person for that purpose is found productive of inconvenience and subject to disappointment and delays in consequence of the extent of the Territory and various casualties that attend the sending special powers for remedy whereof.

SEC. 1. Be it enacted by the Legislative Council, and House of Representatives of the Illinois Territory, and it is hereby enacted by the authority of the same, That the clerks of the county courts, in the respective counties in which they are clerks, shall be authorised and are hereby required to administer the oaths prescribed by law, to all persons who may be appointed to offices within their respective counties whenever thereto required, by any person producing a commission from the Governor appointing him to any office as aforesaid, and it shall moreover be the duty of each clerk as aforesaid to make and preserve a record of all such cases and transmit once in every three months a list of those persons to whom he may have administered such oaths together with the several dates thereof to the Secretary of the Territory.

RISDON MOORE,

Speaker of the House of Representatives.

PIERRE MENARD.

President of the Council.

Approved, Jan. 9th 1816.

NINIAN EDWARDS.

AN ACT to amend the act entitled "*an act establishing Courts for the trial of small causes.*"

SEC. 1. Be it enacted by the Legislative Council, and House of Representatives of the Illinois Territory, and it is hereby enacted by the authority of the same, That so much as is contained in the nineteenth section of the act entitled "*An Act establishing Courts for the trial of small causes*" passed the seventeenth day of September eighteen hundred and seven, as requires Constables who do not possess a freehold estate of the value of three hundred dollars to give bond with one good freeholder as security shall be and the same is hereby repealed and that hereafter any house holder resident in the County who may be approved by the County treasurer shall be deemed and taken as sufficient security in any such bond required by law to be given by any constable as required in the above recited section of the act aforesaid.

SEC. 2. Be it further enacted, That all bonds required by the above recited act to be given by constables shall be given to the county treasurers in the respective counties; and such bonds so given shall be conditioned in like manner and for the same purposes as contained in the above recited act.

RISDON MOORE

Speaker of the House of Representatives,

PIERRE MENARD

President of the Council,

Approved Jan. 9, 1816.

NINIAN EDWARDS.

AN ACT concerning the court of Appeals for Illinois Territory and the several circuit courts and for other purposes.

SEC. 1. Be it enacted by the Legislative Council and House of Representatives of the Illinois territory and it is hereby enacted by the authority of the same, That the circuit courts of this territory within the respective counties composing each circuit shall have jurisdiction over all cases, matters and things at common law and in chancery of the value of twenty dollars and upwards and also of cases and vagrancy attachments, divorces, motions against public debtors, clerks, sheriffs, collectors of public monies for the territory or any county thereof and of all other matters and things civil or criminal, of which the general court or court of common pleas, had jurisdiction on the thirty first day of December in the year of our lord one thousand eight hundred and fourteen (except in those cases in which the county courts now have jurisdiction) and the United States Judges appointed for the Illinois Territory in their respective circuits shall in term and in vacation, possess the same powers and perform the same duties in matters cognizable by the circuit courts which were vested in and required of the Judges of the General court and courts of common pleas on the 31st day of December 1814 except those which are now vested in and exercised by the Judges of the county courts, and the rules and regulations prescribed by law for the exercise of the powers and duties hereby granted in all cases applicable shall govern the said circuit courts and the Judges thereof, and be pursued by all officers and litigants in said courts respectively—And in all cases not provided for by law the said circuit courts shall have power to adopt such rules and regulations as may be necessary to effectuate the powers hereby granted.

SEC. 2. And be it further enacted, That all process, recognizances and other proceedings which were on the 31st day of December 1814 required to be made returnable to either the General court or courts of common pleas (except those that are returnable to the county courts) shall hereafter be made returnable to the circuit courts, respectively.

SEC. 3. Be it further enacted, That all clerks, sheriffs and other officers in the respective circuit courts shall possess the same powers perform the same duties and receive the same fees and have the same mode of collecting them and enjoy all the rights which the like officers possessed and might have exercised in the courts of common pleas and the General court on the 31st day of December 1814, Provided however that nothing herein contained shall be construed to confer any power or require any duty repugnant to a law of Congress entitled "An act regulating and defining the duties of the United States Judges for the territory of Illinois," passed March 3d 1815 it being the intention of this Legislature to confer on the aforesaid circuit courts and the Judges thereof such powers and to require of them such duties as the United States Judges for this territory have heretofore from time to time exercised and performed in those cases only in which such powers and duties shall not be repugnant to the before recited act of Congress.

SEC. 4. Be it further enacted, That the court of Appeals for Illinois Territory shall have full power and jurisdiction over all the books, papers, records and proceedings of the late General Court formerly held at Kaskaskia and it shall be the duty of the Clerk of the court of Appeals for Illinois territory to demand of the late Clerk of the said General Court, all the said books, papers, and proceedings of said court at Kaskaskia which said books, papers records, and proceedings shall be deposited in the office of the said court of Appeals and be by him kept as papers of his office and all copies thereof shall be certified by him.

SEC. 5. Be it further enacted, That all the books, papers, records and proceedings of the late General Court held at Cahokia shall be delivered by the late Clerk of the General Court or his deputy at that place to the clerk of the circuit court for St. Clair county and be by him kept as papers of his office and all copies thereof shall be certified by him.

SEC. 6. Be it further enacted, That it shall be lawful for the

clerk of the court of Appeals for Illinois territory to issue execution upon any judgment rendered by the General Court at Kaskaskia or replevin Bond, upon which the party was entitled to execution on the 31st day of December 1814 or upon any replevin bond taken according to law upon any execution from the said General Court holden at Kaskaskia which shall have been taken by any Sheriff, before or after that day—and becomes due since that day and the Clerk of the circuit court of St. Clair county may in like manner issue execution upon judgments rendered by the said General Court at Cahokia and upon replevin bonds, which said executions shall be executed and returned in the respective Clerks offices as other executions are now directed by law to be executed and returned, and the several Clerks of the circuit courts shall have authority to issue execution in like manner upon judgments rendered by courts of Common Pleas in the respective counties, and on replevin bonds, which executions shall be executed and returned to the respective clerks offices from whence they issued.

SEC. 7. Be it further enacted, That all executions which may be issued out of the court of Appeals for Illinois territory and circuit courts shall be executed and be made returnable according to law, and the clerk of the said court of Appeals shall keep his office in the town of Kaskaskia, and the clerks of the circuit courts shall hold their offices at the court houses of the respective counties.

SEC. 8. Be it further enacted, That the Sheriffs of the several Counties shall execute and return to the several circuit courts and to the court of Appeals aforesaid all process whatsoever in the same manner as was directed by law on the 31st day of December 1814 to the courts of Common Pleas and General Court, and they shall receive the same fees for their services as was then allowed by law in the last mentioned courts and they shall generally perform the same duties so far as the same can be consistently applied, that by law was then required and directed in the courts of Common Pleas and General Court and subjeect to the same penalties for failure.

SEC. 9. Be it further enacted. That the court of Appeals and circuit courts aforesaid shall have power to punish all contempts to them offered, and inflict the same punishment and fines as in similar cases, the courts of common pleas were authorised to do by law on the 31st day of December 1814.

SEC. 10. Be it further enacted, That all fines, amercements and

forfeitures which shall hereafter be assessed by any circuit court shall be for the use of the county in which such fine amercement or forfeiture shall be assessed, and shall be when collected paid into the county Treasury—And all fines, forfeitures and amercements which shall be assessed in the courts of Appeals for Illinois Territory, shall be paid into the Territorial Treasury. And it shall be the duty of the Territorial Auditor to superintend the collection of the fines, forfeitures and amercements payable to the Territory; and for that purpose shall examine the clerks office of the courts of Appeals annually to see what fines, amercements and forfeitures have been assessed therein and cause them to be accounted for.—And the respective county Treasurers shall perform the same duties in their respective counties as are required of the Territorial Auditor all of which said fines, forfeitures and amercements shall be paid and accounted for on the first day of Dec. annually.

SEC. 11. Be it further enacted, That in all cases where it may have been the duty of any sheriff, clerk or collector of any public money to have made collections and have settled with proper authority and he or they shall have failed to have done so, or shall hereafter fail so to do, and there shall appear to be any defect in the bond given by said officer or other proceeding sufficient to exempt from liability the security of said officer or to defeat the ordinary proceedings against himself, the circuit court shall have power to compel such person whether in or out of office, who has collected or ought to have done so, to exhibit upon oath a full and fair statement of all monies by him collected and a list of all persons as far as it may be practicable to obtain the same of whom such person had a right to collect and who had failed to pay him accordingly, and the court upon hearing the whole case without regard to form, shall have power to give Judgment for such sums of money which such person or persons as aforesaid ought to be liable to pay according to the true spirit of the laws and the principles of equity. Provided however that in all motions against public debtors the defendants shall have ten days notice of the time and place when and where the motion to the court will be made against them. This act to be in force from the passage thereof.

RISDON MOORE

Speaker of the House of Representatives,

Approved, Jan. 9, 1816,

NINIAN EDWARDS.

PIERRE MENARD

President of the Council.

AN ACT *amendatory to the Law concerning Dunkards and Quakers.*

Whereas an act passed December 1st 1813 for the relief of Dunkards and Quakers exempting them from militia duty by their paying a sum annually to the Sheriff of the County where they reside, and whereas by the aforesaid recited act it is to be appropriated to the use of the county.

Be it enacted by the Legislative council and House of Representatives and it is hereby enacted by the authority of the same, That so much of the above recited act as make the said sums paid by Dunkards and Quakers for their exemption from militia duty a county tax shall be and the same is hereby repealed and hereafter it shall be a territorial tax, subject to the same rules and regulations that all other Territorial taxes are. This act to be in force from and after the passage.

RISDON MOORE,

Speaker of the House of Representatives,

PIERRE MENARD,

President of the Council.

Approved Jany. 9, 1816.

NINIAN EDWARDS.

AN ACT *to compel the citizens of this territory to afford legal assistance to certain officers in the due execution of their offices.*

Be it enacted by the Legislative Council and House of Representatives and it is hereby enacted by the authority of the same, That whenever any Judge, Justice of the peace Sheriff Coroner or Constable, shall lawfully call upon any person to aid and assist in the lawful execution of their duties of any such office as aforesaid; and if any such person so called upon, shall fail or refuse to assist accordingly he shall be liable to a fine of \$15 to be recovered before a Justice, of the peace & to be paid by the officer collecting the same, into the hands of the county treasurer, who shall apply it in the aid of the county levy and account for the same, as he is required to account for any other sum of money that may come into his hands.

RISDON MOORE

Speaker of the House of Representatives,

PIERRE MENARD

President of the Council,

Approved Jan. 9, 1816.

NINIAN EDWARDS.

*AN ACT supplementary to the several laws for levying and
collecting a tax on land*

SEC. 1. Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory and it is hereby enacted by the authority of the same, That all non-resident Land claimants shall enter their lands for taxation with the Auditor of public accounts at his office on or before the first day of August next agreeably to the form herein after directed and expressed; and it shall moreover be the duty of all non-resident land claimants when any transfer or other alteration shall be made by them at any time after the said first day of August next in any of their lands or any purchase, gift, or grant thereof to or from any non-resident claimant to notify any such alteration, Gift or Grant to the Auditor of public accounts and it shall be the duty of the Auditor to note the same in his Book of non-residents lands and to make the required alteration in the next annual list.

SEC. 2. Be it further enacted, That in case any non-resident shall fail or refuse to make an entry or entries as provided in the foregoing section or shall fail or refuse to perform any of the provisions therein contained it shall and may be lawful for the Auditor to list such non-residents land from the best information he can get and such list made by the auditor and all sales made of such lands so listed shall be effectuate and valid and be provided or in the same way as if the same had been made by any such non-resident land claimant.

SEC. 3. Be it further enacted, That the form of the lists of non-residents land claimants shall be in the following manner and the lists of all county commissioners hereafter to be made of land subject to taxation shall be in the following manner or as nearly so as the circumstance will permit, (viz.)

| Date of entering list. | Person's names chargeable with the tax. | No of acres of land. | | | County in which the land lies | water course on which the land lies. |
|------------------------------|---|----------------------|---------|---------|-------------------------------------|--|
| | | 1st rate | 2d rate | 3d rate | | |
| | | | | | | |

| Name of original claimant no of the survey, or no of the claim. | In whose name con. firmed. | In whose name pur- ch'd from U. States. | No of section half section qr. section or fraction. | No. of Township | No. of range | amount of the tax due { cts. dols, |
|--|----------------------------------|--|--|--------------------|--------------|---|
| | | | | | | |

SEC. 4. Be it further enacted, That it shall be the duty of the Auditor to cause to be published eight weeks in some news-paper printed in this territory, and in some public news-paper published at the seat of the genaral government, requiring all non-resident land claiments to enter their lands for taxation according to the provisions contained in this act, and the several laws to which this is a supplement; and he shall draw a warrant or warrants on the treasury for the expense of the same.

RISDON MOORE,
Speaker of the House of Representatives.

PIERRE MENARD,
President of the Council

Approved, Jan. 9th 1816.

NINIAN EDWARDS.

AN ACT to erect a new county out of the counties of Randolph and Johnson.

SEC. 1. Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory, and it is hereby enacted by the authority of the same, That all that part of the counties of Randolph and Johnson included within the following bounds to wit: Beginning at the mouth of Big Muddy river and running up the same to the township line between ten and eleven; thence east with said line to the principal meridian line running from the mouth of the Ohio river; thence north with the meridian line thirty miles; thence west twenty four miles to the corner of range between four and five west of the principal meridian line; thence south six mites to the township corner between six and seven; thence to the head waters of the creek called Gagnie, and down it to the Mississippi; thence down the Mississippi to the beginning, shall be a seperate and distinct county and called and known by the name of Jackson. And for the purpose of fixing the permanent seat of justice for the said county, the following persons are appointed commissioners, Robert Cox, William Boon, Zephna Brooks, Jesse Griggs and James Gill, which said commissioners, or a majority of them after having been duly sworn before some judge or justice of the peace in this territory to faithfully take into consideration the situation of the settlements, the interest of the people and the eligibility of the place, shall meet on the first Monday of April next at the house of Nathan Davis, on Big Muddy, and proceed

to examine and determine on the place for the seat of justice and designate the same; *Provided*, the owner or owners of the land will give to the county for the purpose of erecting public buildings, a parcel of land at the said place not less than twenty acres, and laid off in lots and sold for the above purpose; but should said owner or owners refuse to make said donation aforesaid, then and in that case it shall be the duty of the commissioners to fix upon some other place for the seat of justice, as convenient as may be to the different settlements in said county, which place when so fixed upon by the said commissioners, they shall certify under their hands and seals and return the same to the next county court in the county; and as a compensation for said services, they shall each be allowed two dollars for every day they may be necessarily employed in fixing the aforesaid seat of justice to be paid out of the county levy, which said court shall cause an entry thereof to be made on their records; and until the public buildings shall be fixed the court shall be holden at the house of Nathan Davis, on Big Muddy river.

SEC. 2. Be it further enacted, That the said county of Jackson is allowed one representative in the House of Representatives in this territory, who shall be elected agreeably to law, and shall be entitled to all the powers, liberties, privileges and immunities allowed by law to other members of the House of Representatives.

SEC. 3. Be it further enacted, That hereafter the counties of Randolph and Jackson, and that part of Monroe county which lies within those bounds which previous to the erection of said Monroe county made a part of Randolph, shall compose one district for the purpose of electing a member to the Legislative council, and the citizens of said county shall be entitled at any election for a member to the Legislative council to represent said district, to proceed to vote for such member; and it shall further be the duty of the Sheriff of Jackson within ten days after the close of the said election to attend at the court house of Randolph county, with a statement of the votes, and the sheriff of Randolph county shall attend at the same time and place with the votes of his county to compare the poles of the respective counties, and join with the sheriffs of Jackson and Monroe counties in making out and delivering to the person elected a certificate of his election; and for a failure thereof they shall forfeit and pay the sum of one hundred dollars each, to the use of the territory

to be recovered by motion of the prosecuting attorney before any court having competent jurisdiction thereof.

SEC. 4. And be it further enacted, That the citizens of the said county of Jackson shall be entitled in all respects to the same privileges in the election of a delegate to congress, that, are allowed to the citizens of any other county; and all elections are to be conducted at the same time and in the same manner as are prescribed by law. This act to commence and be in force from and after the first day of April next.

RISDON MOORE,
Speaker of the House of Representatives.

PIERRE MENARD,
President of the Council.

Approved, January 10, 1816.

NINIAN EDWARDS.

AN ACT respecting the recording of proceedings in law suits.

Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory, That any law now in force requiring the clerk or clerks of any court in this territory, to make out a complete record of the proceedings and papers filed in any suit except when the title of land may come in question, be, and the same is hereby repealed; and if any clerk shall hereafter make out a complete record at the request of one of the parties litigant, he shall be entitled to the same compensation from the party requesting the same, as was allowed by law heretofore. This act to commence and be in force from and after the passage thereof.

RISDON MOORE,
Speaker of the House of Representatives.

PIERRE MENARD,
President of the Council,

Approved, January 10, 1816.

NINIAN EDWARDS.

AN ACT to erect a new county out of the counties of Gallatin and Johnson.

SEC. 1. Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory, and it is hereby enacted by the authority of the same, That all that tract of country situate and lying within the following bounds, to-wit: Beginning on the Ohio

river where the meridian line leaves it that divide ranges number three and four, east of the third principal meridian; thence north to the township line, dividing township ten and eleven south; thence east eighteen miles; thence to that point on the Ohio where the line dividing range eight and nine leaves it; thence down the same to the beginning, shall constitute a separate county, to be called and known by the name of Pope: and for the purpose of fixing the permanent seat of justice for the said county, the following persons shall be and hereby are appointed commissioners, viz: Samuel Omelvany, Benom Lee, John Reed, James N. Fox and James Titsworth, which said commissioners or a majority of them being first duly sworn before some judge or justice of the peace in this territory, to faithfully take into view the situation of the settlements, the geography of the county, the convenience of the people, and the eligibility of the place, shall meet on the first Monday in April next, at the house of Thomas Ferguson, on the Ohio river, and proceed to examine and determine on the place for the permanent seat of justice and designate the same: *Provided*, the proprietor or proprietors of the land shall give to the said county for the purpose of erecting public buildings, a quantity of land at the said place, not less than twenty acres, to be laid off in lots and sold for the above purpose. But should said proprietor or proprietors refuse or neglect to make the donation aforesaid, then and in that case, it shall be the duty of the commissioners to fix upon some other place for the seat of justice as convenient as may be to the different settlements in said county; which place so fixed and determined on, the said commissioners shall certify under their hands and seals, and return the same to the next county court in the county aforesaid; and as a compensation for their services they shall each be allowed two dollars for every day they may be necessarily employed in fixing the aforesaid seat of justice, to be paid out of the county levy, which said court shall cause an entry thereof to be made on their records; and until the public buildings shall be fixed, the court shall be holden at the house of Thomas Ferguson, on the Ohio river.

SEC. 2. Be it further enacted. That it shall any may be lawful for the governor of this territory immediately to constitute the militia within the county thus laid off into one regiment; the commanding officer shall have the same power to order out the militia as is now possessed by the lieutenant colonels of the respective regiments.

SEC. 3. Be it further enacted, That the said county of Pope is

hereby allowed one representative in the house of representatives of this territory, who shall be elected agreeably to law, and be entitled to all the immunities, powers and privileges prescribed by law to the members of the house of representatives.

SEC. 4. Be it further enacted, That the counties of Johnson and Pope shall compose one district for the purpose of electing a member to the legislative council, and the citizens of said county entitled to vote, may at any election for a member of the legislative council to represent said district, proceed to vote for such member; and it shall moreover be the duty of the sheriff of the said county of Pope, within ten days after the close of said election, to attend at the court house of the county of Johnson with a statement of the votes, and the sheriff of Johnson county shall attend at the same time and place with the votes of his county to compare the polls of the respective counties, and to join with the sheriff of Pope in making out and delivering to the person duly elected, a certificate thereof; and for a failure thereof they shall forfeit and pay the sum of one hundred dollars each, to the use of the territory, to be recovered by motion of the prosecuting attorney before any court having competent jurisdiction thereof.

SEC. 5. Be it further enacted, That the citizens of the said county of Pope, are hereby entitled in all respects, to the same rights and privileges in the election of a delegate to congress, as well as for a member of the house of representatives of the territory that are allowed by law to other counties of this territory, and all elections are to be conducted at the same times and in the same manner as are prescribed by law for other counties. And whereas the county of Gallatin at present is allowed to two members in the house of representatives, in future, it shall only be entitled to one. This act to take effect from and after the first day of April next.

RISDOM MOORE,
Speaker of the House of Representatives.

PIRRE MENARD,
President of the Council.

Approved, January 10, 1816.

NINIAN EDWARDS.

AN ACT concerning the title papers to land deposited with the receiver of public monies for the district of Kaskaskia.

SEC. 1. Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory, and it is hereby enacted by the authority of the same, That all copies of deeds or other conveyances of land, which have been deposited in the office of, and which shall be certified by the receiver of public monies for the district of Kaskaskia, where the originals have not heretofore been recorded, may be recorded in any recorder's office of this territory and such record shall be as valid in law as if the original deed or conveyance had been adduced to the recorder to be recorded.

SEC. 2. Be it further enacted, That all copies of deeds or other conveyances aforesaid shall be recorded within two years from the date of the passage of this act, and the receiver shall be entitled for transcribing any such deed or conveyance the like fees as are allowed to the recorders of the several counties in this territory, and for endorsing his certificate to any such copy twenty-five cents, to be paid by the applicant at the time of delivering the copy. This act to take effect from and after the passage thereof.

RISDON MOORE,

Speaker of the House of Representatives.

PIERRE MENARD,

President of the Council

Approved, January 10, 1816.

NINIAN EDWARDS.

AN ACT to authorise the Governor to issue commissions to all officers civil and military in the new counties, erected at the present session of the Legislature.

Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory, That the Governor be, and is hereby authorised and empowered to issue all commissions for officers both civil and military, in the new counties erected at the present session of the Legislature, and the officers so appointed shall, so soon as the laws erecting said counties respectively shall be in force, exercise all the powers and perform all the duties in said counties, as other officers of the same description now exercise in this territory, but until the said laws shall be in force, the said officers shall exercise no powers,

nor be required to perform any duties under the commissions issued by virtue of this act; and the judges commissions of the county courts in said new counties shall take effect, and hold good for the term of three years, commencing with the operation of the laws establishing said new counties respectively, under the same restrictions as are specified in the act increasing the jurisdiction of the county courts,

RISDON MOORE,
Speaker of the House of Representatives.
PIERRE MENARD,
President of the Council.

Approved, January 10, 1816.

NINIAN EDWARDS.

AN ACT concerning the duties and fees of the clerk of the court of appeals for Illinois Territory.

Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory, and it is hereby enacted by the authority of the same, That the clerk of the court of appeals for Illinois territory shall perform the same duties in similar cases and be entitled to the same fees as the clerk of the general court was required to perform and allowed to receive by law on the thirty first day of December eighteen hundred and fourteen, and he shall have the same mode of recovering his fees as the said clerk of the general court had on the day aforesad.

RISDON MOORE,
Speaker of the House of Representatives,
PIERRE MENARD,
President of the Council.

Approved, January 11, 1816.

NINIAN EDWARDS.

AN ACT concerning District Attornies.

Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory, and it is hereby enacted by the authority of the same, That the new counties of Pope and White, so soon as the laws erecting those counties shall take effect shall be added to and make a part of the district heretofore composed of the

counties of Johnson, Gallatin and Edwards; and that the new counties of Monroe and Jackson, so soon as the laws erecting those new counties shall take effect, shall be added to and make a part of the district heretofore composed of the counties of Madison, St. Clair and Randolph; and it shall be the duty of the district attorneys appointed to prosecute in the districts aforesaid, to prosecute in all cases according to law that may arise within any new county hereby attached to their districts respectively.

RISDON MOORE,
Speaker of the House of Representatives.

PIERRE MENARD,
President of the Council

Approved, January 11, 1816.

NINIAN EDWARDS.

AN ACT *to amend an act entitled, "an act supplemental to an act entitled, "an act to amend the militia law of this Territory."*

Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory, and it is hereby enacted by the authority of the same, That the provisions contained in the first section of an act entitled, "An act supplemental to an act entitled, an act to amend the militia law of this territory, shall be and the same is hereby repealed.

RISDON MOORE,
Speaker of the House of Representatives.

PIERRE MENARD,
President of the Council.

Approved, January 11, 1816.

NINIAN EDWARDS.

AN ACT *making appropriation for the year 1816, and for other purposes.*

SEC. 1. Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory, and it is hereby enacted by the authority of the same, That the sum of one hundred dollars is hereby appropriated to defray contingent expenses for the year one thousand eight hundred and sixteen, and that all monies which may be received into the territorial treasury during the present year, except as above appropriated for contingent expenses, shall be a general fund

for all monies allowed by law. The said sum of one hundred dollars allowed for contingent expenses shall be subject to the orders of the Governor on the Auditor for the payment of expenses and allowances which may be necessary, and unforeseen and unprovided for by the legislature and for distributing the laws; a statement of which shall be laid by the governor and auditor before the legislature at its next session.

SEC. 2. Be it further enacted, That there shall be paid out of the territorial treasury on the warrant of the auditor to each member of the Legislative Council and house of Representatives, the sum of three dollars per day for each days attendance at the present session of the legislature, and at the rate of three dollars for every twenty miles travel to and from the seat of government to their places of residence by the most usual road. To the secretary of the legislative council for his services at the present session, the sum of three dollars and fifty cents per day; and to the clerk of the House of Representatives for his services at the present session, the sum of three dollars and fifty cents per day; and to the engrossing and enrolling clerk, the sum of three dollars and fifty cents per day; and to the door keeper of both houses the sum of two dollars per day for every days attendance at the present session.

SEC. 3. Be it further enacted, That the compensation which may be due to the members and officers of the legislative council shall be certified by the secretary thereof, and the secretary's by the president thereof; and those that may be due to the members and officers of the House of Representatives including the engrossing and enrolling clerk and door-keeper shall be certified by the clerk, and the clerk's by the speaker, which certificate shall be sufficient evidence to the auditor of the claim, and he shall thereupon issue to such person so entitled a warrant or warrants on the territorial treasury for the amount of his certificate, which warrant as well as all other warrants shall draw interest from the date thereof until paid at the treasury.

SEC. 4. Be it further enacted, That the following shall continue for one year commencing on the first day of January, one thousand eight hundred and sixteen, to be the salaries of certain officer as follows, viz. For the two prosecuting attornies, one hundred and fifty dollars each. To the auditor of public accounts, the sum of three hundred dollars; for the territorial treasurer, the sum of two hundred dollars. To the adjutant general one hundred dollars.

SEC. 5. Be it further enacted, That there shall be allowed and paid out of the general fund to the following persons the following sums of money, viz. To William Bennett, for house room and firewood during the present session, two dollars per day. To William Arrundel, for stationary furnished at the present session nine dollars and twenty-five cents. To Matthew Duncan, for printing the judiciary memorial three dollars. To Hugh H. Maxwell, auditor of public accounts for furnishing a copy of certain abstracts to the several county treasuries of the territory and other services, the sum of twenty-nine dollars and seventy-five cents. To Thomas Sloo, for a transcript of sales of land in the Shawneetown district furnished the auditor of public accounts, the sum of thirty dollars. To Michael Jones, for the like services to that of Mr. Sloo, one hundred dollars. To William C. Greenup, clerk to the court of appeals for a book of records for his office, seventeen dollars. To Robert Morrison, for books furnished his office while clerk to the late general court, the sum of thirty three dollars. To Pierre Menard, for paper furnished the legislature, the sum of four dollars. To William B. Whitesides, for five days service as adjutant pro-tem. at two dollars per day by order of colonel Judy, ten dollars.

RISDON MOORE,

Speaker of the House of Representatives.

PIERRE MENARD.

President of the Council.

Approved, Jan. 11, 1816.

NINIAN EDWARDS.

AN ACT declaring to whom the redemption money for lands sold for taxes shall be paid.

SEC. 1. Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory, That the clerks of the several county courts respectively, shall hereafter receive the redemption money for lands sold for the taxes, in like manner and subject to the like rules and regulations as were prescribed to the clerks of the courts of common pleas, by the laws in force on the twenty-first day of December, 1814: *Provided, however,* That no such clerk shall either directly or indirectly bid for or be concerned in any bid for, or in the purchase of any tract of land sold for taxes, till after the period of redemption shall have elapsed. And any clerk being either directly

or indirectly concerned in any purchase contrary to this act, shall be deemed guilty of a high misdemeanor; and all such purchases made contrary to the intention of this act, shall be absolutely null and void to all intents and purposes whatever.

SEC. 2. Be it further enacted, That no sheriff of any county, shall be at liberty to become a bidder for any land sold for taxes in the county in which he resides, under the same circumstances, and under the same penalties as are prescribed in the first section of this act. This act to take effect from and after the passage thereof.

RISDOM MOORE,

Speaker of the House of Representatives.

PIRRE MENARD,

President of the Council.

Approved, January 11, 1816.

NINIAN EDWARDS.

AN ACT to suppress the counterfeiting of bank notes.

SEC. 1. Be it enacted by the Legislative Council and House of Representatives of the Illinois Territory, and it is hereby enacted by the authority of the same, That if any person within this territory shall falsely make, alter, forge or counterfeit, or cause or procure to be falsely made, altered, forged or counterfeited any bill or note for the payment of money which shall on the face thereof, purport to be the note of any bank within any one of the United States, or any one of their territories, whether such bank be or be not in existence at the time that such note shall be so falsely made, altered, forged or counterfeited, every such person, whether he shall pass or attempt to pass such false, altered, forged or counterfeit note, so purporting as aforesaid or not, shall be deemed and adjudged guilty of felony; and being thereof convicted according to the due course of law, shall suffer death by hanging, without benefit of clergy.

SEC. 2. Be it further enacted, That if any person within this territory shall manufacture or cause or procure to be manufactured, or shall bring into the territory, or dispose of any paper resembling that on which bank notes are usually issued, with intent that the same shall be used for the purpose of making any false, forged or counterfeit note, every such person shall be deemed and adjudged guilty of felony; and being thereof legally convicted, shall suffer death, without the benefit of clergy.

SEC. 3. Be it further enacted, That if any person within this territory shall make, or cause or procure to be made, or shall aid or assist in making any plate, or shall make or cause or procure to be made, or shall aid or assist in making of any engraving, or shall bring into the territory, or dispose of any plate or engraving, with intent that the same shall be used for the purpose of making any false, forged or counterfeit note, every such person shall be deemed and adjudged guilty of felony; and being thereof legally convicted, shall suffer death, without benefit of clergy.

SEC. 4. Be it further enacted, That if any person within this territory shall utter, or publish as true, or shall pass or attempt to pass as good and genuine, any false, altered, forged, counterfeit bill or note, for the payment of money, purporting to be the bill or note of any bank within one of the United States, or any one of their territories, whether such bank be or be not in existence at the time, with intent to defraud, and knowing the same to be false, altered, forged or counterfeited, every such person shall be deemed and adjudged guilty of felony; and being thereof legally convicted, shall be sentenced to pay a fine of four fold the amount of such note or bill as aforesaid, and to receive not less than thirty-nine lashes well laid on, on his bare back; and shall moreover be deemed infamous, and be held incapable of holding any office, or of giving testimony in any case whatever.

SEC. 5. Be it further enacted, That if any person within this territory shall aid or assist any other person, in uttering or publishing as true, or in passing or attempting to pass as good and genuine, or shall conspire with one or more persons, to pass any false, altered, forged or counterfeited note or bill as aforesaid, with intent to defraud, knowing the same to be false, altered, forged or counterfeited, every such person shall be deemed and adjudged guilty of felony; and being thereof legally convicted, shall be sentenced to pay a fine of forefold the amount of such note or notes, bill or bills as aforesaid, and shall receive thirty-nine lashes well laid on, on his bare back; and shall moreover be deemed infamous, and be held incapable of holding any office, or giving testimony in any case whatever.

SEC. 6. Be it further enacted, That if any person within this territory shall attempt to seduce any other person into, or engage him in any unlawful attempt or attempts, conspiracy or conspiracies to utter and publish as true, or to pass as good and genuine any such

false, altered, forged or counterfeit note or bill as aforesaid, every such person so offending, and being thereof legally convicted, shall be sentenced to pay a fine of five hundred dollars, and to receive thirty nine lashes well laid on, on his bare back.

SEC. 7. Be it further enacted, That if any person within this territory, shall actually secret, with intent to conceal any money-moulds, any plate or engraving suitable for making such false, altered, forged or counterfeit notes or bills as aforesaid, or shall keep in his possession for the space of one month without giving notice thereof to some judge or justice of the peace, any moulds suitable for making counterfeit money, or any such plates or engravings as aforesaid; every such person being thereof legally convicted, shall be sentenced to pay a fine of five hundred dollars, and to receive thirty nine lashes well laid on, on his bare back.

SEC. 8. Be it further enacted, That if any person who shall be sentenced to pay any fine imposed by this act, shall be unable or fail or refuse to pay the same, every such person shall be committed to jail, there to be safely kept in the apartment provided for criminals till the next term succeeding that at which he was convicted, unless the fine shall be sooner paid; in which case he shall be immediately discharged; but if the fine shall not be paid on the first day of the term succeeding his conviction, he shall still remain in safe keeping as aforesaid, and it shall be the duty of the court to enter up an order on their records directing the sheriff of the county to sell the said offender for the term of seven years, first having given three weeks previous notice of the time and place when and where said offender shall be offered for sale; and it shall be the duty of such sheriff to sell the said offender accordingly for ready money to the highest bidder, and the proceeds of such sale shall be applied to the payment of the prison dues or fees, which may have been created by the detention and confinement of the said offender, and the ballance shall be accounted for by said sheriff as he is now bound by law to account for other fines collected by him of a like nature.

SEC. 9. Be it further enacted, That if any person shall be sold for the cause and in the manner prescribed by the last section, and such person shall runaway or absent himself from the service of his master or owner without the consent of said master or owner, it shall be lawful for any county court or other court of common law, upon motion to them made for that purpose to hear the complaint of said

master or owner; and if upon the hearing thereof the said court shall be satisfied by legal testimony, that the person so sold as aforesaid did runaway or absent himself from the service of his master without leave, it shall be the duty of such court to enter up a judgment that such person for running away or absenting himself as aforesaid shall serve his said master an additional term consisting of double the length of time that such person was runaway or had absented himself from the service of his said master or owner.

RISDON MOORE,
Speaker of the House of Representatives.

PIERRE MENARD,
President of the Council.

Approved, January 11, 1816.

NINIAN EDWARDS.

RESOLUTIONS.

WHEREAS, This legislature is informed that the register and receiver of the land office, for the district of Kaskaskia, are required to designate a township of land allotted to this Territory, by an act of congress for the benefit of a semmary of learning, and as the duties of those officers will not admit of their absence from their offices a sufficient length of time to enable them to make the most advantageous and beneficial selection; Therefore be it

RESOLVED by the Legislative Council and House of Representatives of the Illinois Territory, That the said register and receiver aforesaid be requested to emply one or more fit persons acquainted with the situation and quality of the unlocated lands in the district, to examine and recommend to them one entire township, which to them may appear best calculated to answer the above intention, and such person so employed by them on producing their certificate to the auditor, shall obtain a warrant for the amount they may allow.

RISDON MOORE,

Speaker of the House of Representatives.

PIERRE MENARD,

Approved, January 4, 1816.

President of the Council.

NINIAN EDWARDS.

RESOLVED by the Legislative Council and House of Representatives of the Illinois Territory, That Nathaniel Pope, and Daniel P. Cook, be appointed a committee to superintend the printing of the laws and journals of the present session of the legislature, whose certificate to the printing of the completion of the said printing, shall entitle him to a warrant from the auditor for the amount to which he may be entitled according to the contract made for the said printing; and that the said committee of superintendance shall be entitled to the sum of twenty five dollars for furnishing a copy of the laws and superintending the printing aforesaid, for which they shall receive a warrant from the auditor on the completion thereof, on the territorial treasury.

RISDON MOORE,

Speaker of the House of Representatives.

PIERRE MENARD,

Approved, January 11, 1816.

President of the Council.

NINIAN EDWARDS.

L A W S

PASSED BY

THE LEGISLATIVE COUNCIL,

AND

HOUSE OF REPRESENTATIVES,

OF

ILLINOIS TERRITORY,

AT

THIER FIFTH SESSION,

HELD AT

Kaskaskia—1816-'17.

KASKASKIA, I. T.

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1817.

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LAWS OF ILLINOIS TERRITORY,

Enacted in 1816-'17.

AN ACT to establish the name of the Town now called "Carthage,"
in the county of Monroe, Illinois Territory.

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, that the town now called "Carthage," in the county of Monroe and Illinois territory, shall hereafter be known by the name of Harrisonville; and in all public writings and documents, whenever the name of said town shall be necessary to be mentioned in said county of Monroe, the name of Harrisonville shall be used.

This act to take effect from and after the passage thereof.

GEO. FISHER,

Speaker of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—December 21, 1816.

NINIAN EDWARDS.

AN ACT to amend an act entitled, "an act to encourage the
killing of Wolves"

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, that so much of the act entitled, "an act to encourage the killing of Wolves," as creates a difference in the compensation allowed by said act to every person who shall kill a wolf not exceeding six months old, and a wolf of six months old and upwards, shall be, and the same is hereby repealed.

SEC. 2. Be it further enacted, That there shall be allowed to any person or persons who shall kill any wolf or wolves conformably to the provisions of the above recited act, upon making the proof required by said recited act, the sum of two Dollars, for each and every such wolf, such person or persons shall kill.

SEC. 3. Be it further enacted, That this act commence and be in force from and after the passage thereof.

SETH GARD,

Speaker of the House of Representatives, pro tempore.

PIERRE MENARD.

President of the Legislative Council.

Approved—December 21, 1816.

NINIAN EDWARDS.

AN ACT for the relief of the county courts of Edwards and Gallatin.

WHEREAS, The county courts for the counties of Edwards and Gallatin, in consequence of a mistake in the revision and promulgation of the Laws defining their duty in laying county levies in the year eighteen hundred and fifteen, laid a tax on neat Cattle in said counties:—For remedy whereof,

Be it enacted by the Legislative Council and House of Representatives of Illinois territory, and it is hereby enacted by the authority of the same, that the said county courts shall be, and they are hereby exempt from all accountability to the public, which they might have incurred in consequence of such levy; and that each and every individual who has paid a tax upon neat cattle in the year eighteen hundred and fifteen, shall be, and they are hereby allowed the amount of said tax, to be deducted from the amount of taxes, which they may be required to pay for any subsequent year. This act to be in force from and after its passage.

SETH GARD,

Speaker of the House of Representatives, pro tempore.

PIERRE MENARD,

President of the Legislative Council.

Approved—December 26, 1816.

NINIAN EDWARDS.

AN ACT providing for the alteration and establishment of the county seat of Justice in Johnson county.

WHEREAS, By reason of the erection of the county of Jackson out of a part of the county of Johnson, the present seat of Justice in Johnson county is found inconvenient to the settled inhabitants of the county, and likely to be so, to the probable future settlements, which may be made therein: For remedy whereof,

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That John Boman, John C. Smyth, William Smyth, John Weldon, and William Piles, be and they are hereby appointed commissioners, who or a majority of them, after being duly sworn before some judge or justice of the peace in this territory, to faithfully take into view the situation of the settlements, the arable lands on which it is likely future settlements will be made, the geography of the country, the convenience of the people, and the eligibility of the place, shall meet on the first Monday in February next, at the house of William Piles, esq. and proceed to examine and determine on the place for the permanent seat of justice for Johnson county, and designate the same: *Provided* the proprietor or proprietors of the land shall give by a deed of conveyance, to be made to the Judges of the county court of Johnson and their successors in office, for the purpose of erecting public buildings, a quantity of land at the said place, not less than twenty acres, to be laid out by direction of the county court, into lots and sold for the benefit of the county, for the purpose of erecting public buildings on such part of the said twenty acres as the county court may deem proper to reserve for that purpose. But should the said proprietor or proprietors refuse or neglect to make the donation aforesaid, then and in that case, the commissioners may fix on some other eligible place, as near thereto, as they may deem consistent with the restrictions aforesaid; which place, when the commissioners shall have fixed and determined on the same, they shall certify under their hands and seals, and return the same to the county court of Johnson county, who shall cause an entry to be made thereof on their records.

SEC. 2. Be it further enacted by the authority aforesaid, That in case the place fixed on by the commissioners aforesaid, shall happen to be saleable lands of the United States, the said commissioners shall certify the same to the county court of Johnson county, who shall as soon as practicable cause the same to be purchased, not exceeding a quarter section of land, and may order the amount of the instalments of the purchase money, to be paid out of the county monies as they may deem expedient; which said land so purchased, shall be laid out into lots, or such part thereof as the court shall direct from time to time, and be sold, and the nett proceeds applied to the erection of public buildings, and refunding the amount of the instalments of

the purchase money aforesaid: *Provided however*, that in case the tract of public land on which the commissioners shall fix and designate, should be purchased by any other person or persons before the county court shall apply for the purchase, the commissioners may designate, and fix on some other eligible place as above mentioned.

SEC. 3. Be it further enacted by the authority aforesaid, that the commissioners aforesaid shall receive a compensation of two Dollars each, for every day that they may necessarily be employed in fixing the aforesaid seat of justice, to be paid out of the county levy, by an order of the county court, and as soon as the county seat shall be designated and established as aforesaid; the county court of Johnson county shall cause the lots to be surveyed and sold in such manner as they may direct, and when the amount of purchase money shall be paid by any purchaser or purchasers, the judges either in or out of court, shall execute to them a deed or deeds of conveyance; and the said county courts shall, as soon as may be, cause suitable buildings to be provided for the accommodation of the several courts, which may be directed to be holden in said county, and when the same shall be provided, the courts for such county shall be holden thereat; but until the same shall be provided, the courts shall be held at the present county seat.

SEC. 4. Be it further enacted, That the commissioners aforesaid, may meet and adjourn from time to time, until they shall have completed their business, as herein provided, after the day fixed on for their first meeting, by the first section of this act, but unless a majority of them shall concur and sign the return to the county court, the same shall not be received and entered of record: *Provided however*, that the said commissioners shall not delay making their report longer than six months after their first meeting. This act to take effect from and after the passage thereof.

SAMUEL OMELVANY,

Speaker of the House of Representatives, pro tempore.

PIERRE MENARD,

President of the Legislative Council.

Approved—December 26, 1816.

NINIAN EDWARDS.

AN ACT *for the relief of Augustin Penceneau and Adalaide his wife.*

WHEREAS Jean F. Perry died possessed of a certain mill on the creek called Prairie du Pont, in the county of St. Clair, and whereas the said mill has descended by the death of the said Perry to his wife, and surviving relict Adalaide, who has since intermarried with the aforesaid Augustin Penceneau, and whereas it is considered doubtful whether said mill is established according to law, and attempts are now making to have the same demolished, and whereas this Legislature is satisfied of the injustice of such attempts and of the anxiety of a large portion of the inhabitants adjacent to the said mill for its remaining in full and undisturbed operation :

Be it therefore enacted by the Legislative Council and House of Representatives of Illinois territory, and it is hereby enacted by the authority of the same, that the mill heretofore established and erected on the Praire du Pont creek, in the county of St. Clair, and which is now in possession of Augustin Penceneau and Adalaide his wife, be, and the same is hereby declared to be legally established, and shall require no order of any court or other tribunal, and that this act shall be a bar to any proceedings now depending, or which may hereafter be commenced; the object of which shall be either a partial or entire demolition of said mill.

SEC. 2. Be it further enacted, That the said mill shall be under the same regulations and restrictions as other mills are, that are duly established by order of any court having power to established the same : *Provided however*, that nothing in this act contained shall be so construed as to authorise the said Penceneau to raise the dam of said mill any higher than it now is, or has heretofore been. This act to take effect from and after the passage thereof.

SETH GARD,

Speaker of the House of Representatives, pro tempore.

PIERRE MENARD,

President of the Legislative Council.

Approved—December 26, 1816.

NINIAN EDWARDS.

AN ACT *to prevent attorneys at law residing in the state of Indiana from practicing in the courts in this territory.*

WHEREAS by a law now in force in the state of Indiana, persons who do not reside therein (although qualified according to the laws of their own state or territory) are not permitted to practice in the courts of the said state, and whereas that restriction is illiberal, unjust and contrary to those principles of liberality and reciprocity by which each and every state or territory should be governed: Therefore,

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory and it is hereby enacted by the authority of the same, that no person residing in the state of Indiana, shall hereafter be permitted to practice as counsellor or attorney at law in any of the courts of this territory.

SEC. 2. And be it further enacted, That if any person residing in the state of Indiana who has heretofore obtained licence, or has been admitted to practice law in any of the courts of this territory, shall attempt hereafter to practice in any of the said courts either by marking his name to any suit on the docket of any such court, filing his warrant of attorney therein, or in any way attempting to avail himself of the privileges of attorney of any such court, he shall be subject to a fine of two hundred Dollars, to be recovered by any person on motion in the court in which such an attempt to practice shall have been made; and the said court shall have power on motion as aforesaid, to enter judgment for the said fine, one half to the use of the territory and the other to the use of the person suing for the same: *Provided however*, that if any practising attorney residing in the said state, has been retained as council in any case now pending in any of the courts of this territory, he shall be permitted to appear in any such case, and attend it to its final termination.

SEC. 3. And be it further enacted, That if any court in this territory shall knowingly suffer or permit any person residing in the said state of Indiana, to practice as counsellor or attorney at law, in any of the courts in this territory, such court whether it be composed of one or more judges, shall be liable to pay five hundred Dollars, which may be recovered by action of debt, *qui tam*, in any court of this territory having competent jurisdiction.

This act shall take effect and be in force from and after the first day of March next, and shall continue in force until the laws of the

state of Indiana herein before referred to shall be repealed, and no longer.

GEO. FISHER,
Speaker of the House of Representatives.

PIERRE MENARD,
President of the Legislative Council.

Approved—December 21, 1816.

NINIAN EDWARDS.

*AN ACT to alter a part of the lines between the counties of
Gallatin and Pope.*

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same. That the line dividing the counties of Gallatin and Pope, as established by the act passed at the last session of the general assembly, entitled an act to erect a new county out of the counties of Gallatin and Johnson, be, and the same is hereby altered as follows, to wit: Beginning at the Rock and Cave on the Ohio river, thence a straight line to the corner of townships number ten and eleven south, and of ranges number seven and eight, east of the third principal meridian; thence west along the line between townships number ten and eleven south twenty-four miles; and thence with the lines established by the said recited act, to the Ohio river, and up the same to the beginning; and that all the tract of country included in the lines of Pope county by this act, shall be attached to and form a part of Pope county.

This act to be in force from and after the passage thereof.

GEO. FISHER,
Speaker of the House of Representatives.

PIERRE MENARD,
President of the Legislative Council.

Approved—December 26, 1816,

NINIAN EDWARDS.

*AN ACT to incorporate the President, Directors and Company
of the Bank of Illinois.*

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That a Bank shall be established at Shawnoetown,

the capital stock whereof shall not exceed three hundred thousand dollars, to be divided into shares of one hundred dollars each, one third thereof to remain open to be subscribed by the Legislature of this territory, or state, when a state government shall be formed, which territory or state shall be entitled to such part of the dividend of the said corporation in proportion to the amount actually subscribed by such territory or state, which one third shall be divided into shares of one hundred dollars each, in the same manner as the individual stock is divided, and that subscriptions for constituting the said stock shall on the first Monday in January next, be opened at Shawnoetown and at such other places as may be thought proper under the superintendence of such persons as shall hereafter be appointed, which subscriptions shall continue open until the whole capital stock shall have been subscribed for: *Provided however*, that so soon as there shall be fifty thousand dollars subscribed for in the whole, and ten thousand thereof actually paid in, the said corporation may commence business and issue their notes accordingly.

SEC. 2. Be it further enacted, That it shall be lawful for any person, or partnership, or body politic to subscribe for such or so many shares as he, she or they may think fit, nor shall there be more than ten shares subscribed for in one day by any person, or co-partnership or body politic for the first ten days after opening said subscriptions. The payments of the said subscriptions shall be made by the subscribers respectively, at the time and manner following, that is to say, at the time of subscribing there shall be paid into the hands of the person appointed to receive the same, the sum of ten dollars in gold or silver on each share subscribed for, and the residue of the stock shall be paid at such times and in such instalments, as the directors may order; *Provided*, that no instalment shall exceed twenty-five per cent. on the stock subscribed for, and that at least sixty days notice be given in one or more public newspapers of the territory: *And Provided also*, that if any subscriber shall fail to make the second payment at the time appointed by the Directors for such payment to be made, shall forfeit the sum so by him, her or them first paid, to and for the use of the corporation.

SEC. 3. Be it further enacted, That all those who shall become subscribers to the said bank, their successors and assigns, shall be and they are hereby enacted and made a corporation and body politic by the name and style of "The President, Directors and Company of

the Bank of Illinois," and shall so continue until the first day of January, one thousand eight hundred and thirty-seven, and by that name shall be and are hereby made able and capable in law to have, purchase, receive, possess, enjoy and retain, to them and their successors, lands, rents, tenements, hereditaments, goods, chattels and effects of what kind, nature or quality soever to an amount not exceeding in the whole five hundred thousand dollars including the capital stock aforesaid, and the same to grant, demise, alien, or dispose of, to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended in courts of record or any other place whatever; and also to make, have and use a common seal, and the same to break, alter and renew at pleasure, and also to ordain, establish and put in execution, such bye laws, ordinances and regulations as they shall deem necessary and convenient for the government of the said corporation, not inconsistent with the laws of the territory or constitution, and generally to do, perform and execute all and singular acts, matters and things which to them it shall or may appertain to do, subject however to the rules, regulations, limitations and provisions hereinafter prescribed and declared.

SEC. 4. Be it further enacted, That for the well ordering of the affairs of the said corporation there shall be twelve Directors, the first election for whom shall be by the stock holders, by plurality of votes actually given, on such day, as the persons appointed to superintend the subscriptions for stock shall appoint, by giving at least thirty days previous notice in all the public newspapers of the territory, and those who shall be duly chosen at any election, shall be capable of serving as directors by virtue of such choice, until the full end and expiration of the first Monday in January next ensuing the time of such election, and no longer; and on the said first Monday of January in each and every year thereafter, the election for Directors shall be holden, and the said Directors at their first meeting after each election shall choose one of their number as President.

SEC. 5. Be it further enacted, That in case it should happen at any time that an election for Directors should not be had upon any day, when pursuant to this act it ought to have been holden, the corporation shall not for that cause be considered as dissolved, but it shall be lawful to hold an election for Directors on any other day, agreeably to such bye laws and regulations as may be made for the government of said corporation, and in such case the Directors for

the time being shall continue to execute and discharge the several duties of directors until such election is duly had and made; any thing in the fourth section to the contrary notwithstanding: *And it is further provided*, that in case of death, resignation, or removal of any Director or Directors, the vacancy shall be filled by election for the balance of the year.

SEC. 6. Be it further enacted, That a majority of the Directors for the time being, shall have power to appoint such officers, clerks and servants under them, as shall be necessary for executing the business of the said corporation, and to allow them such compensation for their services respectively as shall be reasonable, and shall be capable of exercising such other powers and authorities for the well governing and ordering of the affairs of the said corporation as shall be prescribed, fixed and determined by the laws, regulations and ordinances of the same: *Provided always*, that a majority of the whole number of Directors shall be requisite in the choice of a President and Cashier.

SEC. 7. And be it further enacted, That the following rules, restrictions, limitation and provisions, shall form and be the fundamental articles of the constitution of the said corporation, to-wit: The number of votes to which the stockholders shall be entitled in voting for Directors, shall be according to the number or shares he, she or they respectively hold in the proportions following, that is to say, for one share and not more than two shares one vote, for every two shares above two, and not exceeding ten, one vote for every four shares above ten and not exceeding thirty one vote, for every six shares above thirty and not exceeding sixty one vote; for every eight shares above sixty and not exceeding one hundred, one vote, for every ten shares above one hundred, one vote; and after the first election, no share or shares shall confer a right of voting, which shall not have been holden three calendar months previous to the day of election.

2. The governor of the state or territory is hereby appointed agent for the legislature, to vote for President, Directors and Cashier of said Bank, and is hereby entitled to exercise the right of voting for the same in proportion to the number of shares actually subscribed for by the Legislature, in the same ratio that individuals, or other bodies politic or corporate are entitled to vote for; and the said agent hereby appointed, shall exercise the power hereby vested in him

until the legislature shall make other regulations respecting the same, and no longer.

3. None but a bona fide stockholder, being a resident citizen of the territory shall be a director; nor shall a director be entitled to any other emolument than such as shall be allowed by the stockholders at a general meeting, but the directors may make such compensation to the president for his extraordinary attendance at the bank, as shall appear to them reasonable and just.

4. Not less than four Directors shall constitute a board for the transaction of business, of whom the President shall always be one, except in case of sickness, or necessary absence, in which case, his place may be supplied by any other director, whom he, by writing under his hand may depute for that purpose.

5. Any number of stockholders, not less than fifteen, who shall be proprietors of not less than fifty shares, shall have power to call a general meeting of the stockholders, for purposes relative to the institution, by giving at least thirty days notice in one or more of the public newspapers of the territory, specifying in such notice the object or objects of such meeting, and may moreover appoint three of their members as a committee to examine into the state, and condition of the bank; and the manner in which its affairs have been conducted. *Provided*, that no member of such committee shall be a director, president or other officer of any other bank.

6. Every Cashier before he enters upon the duties of his office, shall be required to give bond with two or more sureties to the satisfaction of the directors, in a sum not less than ten thousand Dollars, conditioned for his good behaviour, and the faithful performance of his duties to the said corporation, and the other officers and servants shall also enter into bond and security in such sum as the president and directors may prescribe.

7. The lands, tenements, and hereditaments which it shall be lawful for the said corporation to hold, shall be only such as shall be requisite for its immediate accommodation in relation to the convenient transaction of its business, and such as shall have been bona fide mortgaged to it by way of security, or conveyed to it in satisfaction of debts previously contracted in the course of its dealings, or purchased upon judgments which shall have been obtained for such debts.

8. The total amount of debts which the said corporation shall at

any time owe, whether by bond, bill, note or other contract, shall not exceed twice the amount of their capital stock actually paid over, and above the monies then actually deposited in the bank for safe keeping; and in case of excess, the directors under whose administration it shall happen, shall be liable for the same in their natural and private capacities, and an action of debt may be brought against them, or any of them, their or any of their heirs, executors or administrators in any court competent to try the same, or either of them, by any creditor or creditors of the said corporation; but this provision shall not be construed to exempt the said corporation, or the lands, tenements, goods or chattels of the same from being liable for, and chargeable with the said excess; such of the said directors who may have been absent, when the said excess was contracted or created, or who may have dissented from the resolution, or act whereby it was contracted or created, may respectively exonerate themselves from being so liable, by forthwith giving notice of the fact and of their absence or dissent at a general meeting of the stockholders which they shall have power to call for that purpose.

9. The said corporation shall not directly or indirectly deal or trade in any thing except bills of exchange, gold or silver, or in the sale of goods, really and truly pledged for money lent and not legally redeemed in due time, or of goods which shall be the produce of its lands, neither shall the said corporation take more than at the rate of six per cent. per annum, for or upon its loans or discounts.

10. The shares of the capital stock of the said corporation shall be assignable and transferable at any time, according to such rules as shall be established in that behalf, by the laws and ordinances of the same; but no stock shall be transferred, the holder thereof being indebted to the Bank, until such debt be satisfied, except the President and Directors shall otherwise order it.

11. The bills obligatory and of credit under the seal of the said corporation, which shall be made payable to any person or persons, shall be assignable by an endorsement thereupon, shall possess the like qualities as to negotiability, and the holders thereof shall have and maintain the like actions thereon as if such bills obligatory and of credit, had been made by or on behalf of a natural person, and all bills or notes which may be issued by order of the said corporation, signed by the President and countersigned by the principal Cashier or treasurer thereof, promising the payment of money to any

person or persons, his, her or their order or to bearer, though not under the seal of the said corporation, shall be binding and obligatory upon the same, in like manner and with like force and effect, as upon any private person or persons, if issued by him, her or them, in his, her or their private or natural capacity or capacities, and shall be assignable and negotiable in the like manner as if they were so issued by such private person or persons, that is to say, those which shall be payable to any person or persons, his, her or their order, shall be assignable by endorsement, in like manner and with like effect, as bills of exchange now are; and those which are payable to bearer, shall be assignable and negotiable by delivery only.

12. Half yearly dividends shall be made of so much of the profits of the bank, as shall be deemed expedient and proper, and once in every three years, the directors shall lay before the stockholders at a general meeting, an exact and particular statement of the debts which shall have remained unpaid, after the expiration of the original credit, for a period of treble the time of that credit, and the surplus of profit, if any, after deducting losses and dividends. If there shall be a failure in the payment of any part of any sums subscribed to the capital of said Bank, the party failing shall loose the dividend which may have accrued prior to the time of making such payment during the delay of the same.

SEC. 8. And be it further enacted, That the said corporation shall not at any time suspend or refuse payment in gold and silver of any of its notes, bills or obligations, nor of any monies received upon deposit in said Bank, or in its office of discount and deposit; and if the said corporation shall at any time refuse or neglect to pay on demand, any bill, note or obligation issued by the corporation according to the contract, promise or undertaking therein expressed, or shall neglect or refuse to pay on demand any monies received in said bank, or in its office aforesaid on deposit, to the person or persons entitled to receive the same, then and in every such case, the holder of any such note, bill or obligation, or the person or persons entitled to demand and receive the same, shall recover interest on the said bills, notes, obligations or monies until the same shall be fully paid and satisfied, at the rate of twelve per centum per annum, from the time of such demand as aforesaid: *Provided*, that the Legislature of this territory may at any time hereafter enact laws to enforce and regulate the recovery of the amount of the notes, bills, obligations or

other debts, of which payment shall have been refused as aforesaid, with the rate of interest above mentioned; vesting jurisdiction for that purpose in any courts either in law or equity, within this territory.

SEC. 9. Be it further enacted, That John Marshall, David Apperson, Samuel Hays, Leonard White and Samuel R. Campbell, or any three of them, shall be commissioners for the purpose of receiving subscriptions, and who shall have power to appoint a person to receive the money required to be paid at the time of subscribing and the said receiver shall as soon as the directors are appointed, pay over the same into the hands of such person as the directors may direct.

SEC. 10. Be it further enacted, That the aforesaid corporation, shall not be dissolved previous to the expiration of their charter, nor until their debts, contracts, notes, bills of exchange and undertakings in their corporate capacity, shall be finally and faithfully settled: *Provided also*, that after the expiration of their charter, they shall not transact business according to the true intent and meaning of this act, further than to settle and close their contracts as above provided. This act to take effect from and after its passage.

WILLIS HARGRAVE,

Speaker of the House of Representatives, pro tempore.

PIERRE MENARD,

President of the Legislative Council.

Approved—December 28, 1816.

NINIAN EDWARDS.

AN ACT supplemental to an act, entitled "An act concerning Executions."

WHEREAS, It appears to this Legislature that gold and silver coin are so scarce in this territory, that it is utterly impossible for the citizens thereof at present to pay their debts in those metals; and that attempts to enforce such payments by legal execution, besides the immense sacrifices of property that would result therefrom, would produce many other distressing consequences: For remedy whereof,

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the same. That upon all executions which now are, or hereafter may be issued upon any judgment or judgments, replevy bond or replevy bonds, which have heretofore been, or may hereafter be recovered or

given, the defendant or defendants shall be permitted to replevy the same for twelve months, upon executing bond in double the amount of any such execution, with sufficient security or securities to the sheriff of the county, conditioned for the payment of the amount of such execution, with all legal interest on the same, together with all costs that may accrue thereupon, unless the plaintiff or plaintiffs shall previous to the taking of any such replevy bond, as is herein authorised, give a written authority to the sheriff to receive in discharge of his execution bank notes of any of the chartered banks of Cincinnati and Chillicothe, in the state of Ohio, and of any of the banks of the states of Tennessee and Kentucky, and of the banks of Vincennes, of Missouri, of St. Louis, and of Illinois, in which case, no other replevin shall be allowed than that which is now prescribed by law. *Provided however*, That nothing herein contained, shall deprive any defendant or defendants who shall exercise that right, to replevy again under this law.

SEC. 2. Be it further enacted, That the same proceedings may be had upon the replevy bonds hereby authorised, that might or could be had upon replevy bonds heretofore allowed; and the sheriff shall be entitled to the same fees for his services as are allowed upon other replevy bonds.

SEC. 3. This act to commence on the date hereof and to continue in force for one year and no longer.

WILLIS HARGRAVE,

Speaker of the House of Representatives, pro tempore.

PIERRE MENARD,

President of the Legislative Council.

Approved—December 28, 1816.

NINIAN EDWARDS.

AN ACT for the division of Edwards County.

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That all that tract of country within the following boundaries, to-wit: Beginning at the mouth of the Embarras, and running with said river to the intersection of the line dividing townships number three and four, north of range eleven, west of the second principal meridian; thence west with said township line to the meridian, and due north until it strikes the line of Upper

Canada; thence to the line that separates this territory from the state of Indiana, and thence south with said dividing line to the beginning, shall constitute a separate county to be called *Crawford*; and the seat of justice for said county, shall be at house of Edward N Cullom, until it shall be permanently established in the following method, that is; three persons shall be appointed, to wit: John Dunlap, Thomas Handy and Thomas Kenedy, which said commissioners, or a majority of them, being duly sworn before some judge or justice of the peace of this territory to faithfully take into view the situation of the settlements, the geography of the country, the convenience of the people, and the eligibility of the place, shall meet on the second Monday in March next, at the house of Edward N. Cullom, and proceed to examine and determine on the place for the permanent seat of justice, and designate the same: *Provided*, the proprietor or proprietors of the land shall give to said county, for the purpose of erecting public buildings, a quantity of land at said place, not less than twenty acres, to be laid out in lots and sold for the above purpose. But should the said proprietor or proprietors refuse or neglect to make the said donation aforesaid, then and in that case, it shall be the duty of the commissioners to fix upon some other place for the seat of justice as convenient as may be to the different settlements in said county; which place when fixed and determined on, the said commissioners shall certify under their hands and seals, and return the same to the next county court, in the county aforesaid; and as a compensation for their services, they shall each be allowed two dollars for every day they may be necessarily employed in fixing the aforesaid seat of justice, to be paid out of the county levy; which said court shall cause an entry thereof to be made on their records.

SEC. 2. And be it further enacted, That the said county of Crawford is hereby allowed one representative in the house of representatives of this territory, who shall be elected agreeably to law, and be entitled to all the immunities, powers and privileges prescribed by law to members of the house of representatives. An election is hereby directed to be held at the house of said E. N. Cullom, in the said county, on the first monday in March next, and continue open three days; and to be conducted in all other respects by the persons and in the manner prescribed by law: At which said election, the persons entitled to vote may elect a representative to the house of representatives, who shall continue in office until the tenth day of October,

eighteen hundred and eighteen, and shall during his continuance in office, be bound to perform the duties, and be entitled to the same privileges and immunities that are prescribed by law to a member of the house of representatives.

SEC. 3. Be it further enacted, That the citizens of said county entitled to vote, may at any election for a member of the legislative council to represent said district, proceed to vote for such member; and it shall moreover be the duty of the sheriff of the said county of Crawford, within ten days after the close of said election, to attend at the court house of the county of White, with a statement of the votes given in the said county of Crawford, and to compare the polls of the respective counties; and it shall be the duty of the sheriffs of Gallatin, White and Edwards counties to attend at such time and place with a statement of the votes of Gallatin, White and Edwards counties, and upon counting the votes of the respective counties, it shall be the duty of the said sheriffs of Gallatin, White, Edwards and Crawford counties, to make out and deliver to the person duly elected a certificate thereof. If the said sheriffs or either of them, shall refuse or fail to perform the duty required of them by this section, such delinquent shall forfeit and pay the sum of two hundred dollars, to be recovered by action of debt or indictment, one half to the territory, and the other half to any person, suing for the same.

SEC. 4. Be it further enacted, That the citizens of the county of Crawford are hereby declared to be entitled in all respects to the same rights and privileges in the election of a delegate to congress, as well as a member to the house of representatives of the territory, that are allowed by law to the other counties of the territory; and all elections are to be conducted at the same time, and in the same manner, except as is excepted by this law, as is provided for other counties. This act shall commence and be in force from after the passage thereof.

SETH GARD,

Speaker of the House of Representatives, pro tempore.

PIERRE MENARD,

President of the Legislative Council.

Approved—December 31, 1816.

NINIAN EDWARDS.

AN ACT *supplemental to an act entitled "An act for the relief of persons imprisoned for Debt."*

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, that whenever any person is in actual confinement on final process in any civil action where the cause of imprisonment is the failure to pay the amount of any judgment rendered against him, such person, shall have a right to give actual notice to all his creditors by writing, if they reside in the territory, or by advertising in any newspaper printed in the territory, if they or any of them reside out of the territory, which last mentioned notice shall be alone sufficient in all cases, that he will on some special day, not less than twenty days after giving such notice, apply either to the county court at its next term, or to some judge thereof in vacation, to take the benefit of the "act concerning insolvent debtors."

SEC. 2. And be it further enacted, That such person so confined as aforesaid, shall have the right of giving notice to any judge of the county court to attend at the court house on any day that such person may name to hear what may be urged in behalf of his liberation, and it shall be the duty of such judge to attend on such day named; and it shall be the duty of such court or judge in vacation to proceed to hear and determine on the case before them, according to the directions of the said recited act; and it shall be the duty of the person applying, to proceed previous to his liberation, in all respects as is prescribed by the law to which this is a supplement, except so far as is altered by this act; and any person thus liberated, shall stand in the same situation as if he had been released by legal sentence under the provisions of the said act to which this is a supplement.

SEC. 3. And be it further enacted, That it shall be the duty of the clerk of said court, to attend at the court house on the day so appointed, and make a record of the proceedings as though the same were a special session of the said court, who shall be entitled to receive therefor, one dollar and fifty cents; and the said judge shall receive the sum of two dollars therefor out of the county treasury of their county; and it shall be the duty of the jailor upon receiving notice from said judge, to bring such prisoner before him, and either recom-

mit or discharge him as the judge may direct. This act to take effect from and after its passage.

SETH GARD,

Speaker of the House of Representatives, pro tempore.

PIERRE MENARD.

Approved—January 1, 1817. *President of the Legislative Council.*

NINIAN EDWARDS.

AN ACT to establish Inspections within this Territory.

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, that public ware houses may be kept at the several places which may be pointed out by the judges of the county courts in each county for an inspection of beef, pork, hemp, flour, and tobacco.

SEC. 2. And be it further enacted, That there shall be kept at the several ware houses that may be established, a good and sufficient pair of scales, sufficient to weigh eighteen hundred weight at least, and a set of small weights, such as ought to be, according to the standard weight of the county, and that the proprietors of each ware house provide the same.

SEC. 3. And be it further enacted, That all beef, tobacco, hemp and flour brought to any of the public ware houses, shall be viewed, inspected and examined, by two persons thereunto appointed by the different county courts for each county, and it shall be the duty of the courts aforesaid to appoint such inspectors, when in their opinion it may be thought necessary, and it shall be the duty of the aforesaid county courts to nominate three fit persons for inspectors at each of their several ware houses within their respective counties, the two first in the nomination shall be considered as the acting inspectors for the ensuing year, and in case of sickness, or death or inability in either of the two first inspectors, the third shall act, and on the disagreement of the said inspectors, the third shall be called in to decide on such articles subject to inspection; and the said judges shall have power on complaint in writing being lodged in the office of the clerk of the county, at their first term after such notice to them given to summon the inspector or inspectors before them, and the court shall have power to continue or dismiss from office him or them, as the case may be, and as the court shall judge just; and such court shall fill all

vacancies which may happen at any time during the remainder of the year; and every such inspector so appointed by virtue of this act before he enters into the execution of his office, shall give bond with approved security in the penal sum two hundred dollars, payable to the governor or his successors in office, conditioned for the true and faithful performance of his duty according to the conditions of this act, which said sum shall be recovered by action of debt before the circuit court for any wilful or flagrant breach of duty; which bond shall be given or entered into before the county court and lodged in the clerk's office of the county.

SEC. 4. And be it further enacted, That all inspectors to be appointed by this act, shall attend at the different ware houses to which they are appointed, on the application of any person who wishes to have his beef, pork, flour or tobacco to be inspected, Sunday excepted, and every inspector neglecting to attend as aforesaid, shall forfeit and pay to the party aggrieved, five dollars to be recovered before any justice of the peace in the proper county. And the said inspectors shall inspect every article that comes within the perview of this act, in such a manner that may be fully satisfied, that each article so inspected shall completely answer in quality to the mark or brand by them made, which shall be marked on the barrel or hogshead, if flour, the letters S. F. for super-fine, and the letter F. for fine, with the gross weight and nett weight marked in figures on the said barrel, if tobacco or pork or beef, the weight in gross and nett marked on the head of said hogshead or barrel.

SEC. 5. And be it further enacted, That the rates of inspection and storage of the several articles so inspected shall be fixed by the several county courts at their first or second courts in every year.

SEC. 6. And be it further enacted, That each hogshead of tobacco shall weigh not less than nine hundred and fifty weight, or exceed eighteen hundred nett, and the barrel of flour shall weigh one hundred and ninety-six pounds nett weight, and each barrel of pork and beef shall weigh not less than two hundred pounds nett weigh each.

SEC. 7. And be it further enacted, That it shall be the duty of the several inspectors under this act, to enter in a book by them kept for that purpose, the mark, number and weight of the several hogsheads and barrels by them inspected, together with the name of the inspector and ware house where such inspection was had.

SEC. 8. And be it further enacted, That each and every inspectors

appointed by virtue of this act, before they enter on the duties of their respective offices, shall be sworn before the clerk of the county court by which they were appointed, that they will faithfully discharge the duties of their office without partiality, favor or affection.

SEC. 9. And be it further enacted, That it shall be the duty of the several inspectors appointed by this act, to furnish the owner or proprietor of any of the above mentioned articles with a certificate of the mark, number and weight of the several articles by them inspected, and to attest such certificate.

SEC. 10. And be it further enacted, That this act shall take effect and be in force from and after the passage thereof.

GEO. FISHER,

Speaker of the House of Representatives.

JOHN G. LOFTON,

President of the Legislative Council pro tempore.

Approved—January 4, 1817.

NINIAN EDWARDS.

AN ACT to regulate the practice in certain cases.

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, that in any action commenced, or which may hereafter be commenced, in any court of law in this territory upon any note, bond, bill or any other instrument of writing for the payment of money or property, or for the performance of covenants or conditions, if such note, bond, bill, or instrument of writing was made or entered into without a good or valuable consideration, or if the consideration upon which such note, bond, bill or instrument of writing was made or entered into has wholly, or in part failed, it shall be lawful for the defendant or defendants against whom such action shall have been commenced, to plead such want of consideration, or that the consideration, upon which such note, bond, bill or instrument of writing was made or entered into, has wholly or in part failed; and if it shall appear that any such note, bond, bill or instrument of writing, was made or entered into without a good or valuable consideration, or that the consideration has wholly failed, the verdict shall be for the defendant; and if it shall appear that the consideration has failed in part, the plaintiff shall recover according to the equity of the case.

This act to be in force from and after its passage.

GEO. FISHER,

Speaker of the House of Representatives.

JOHN G. LOFTON,

President of the Legislative Council, pro tempore.

Approved—January 4, 1817.

NINIAN EDWARDS.

AN ACT forming a new county out of the county of Madison.

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, that all that tract of country within the following boundaries, to-wit: Beginning at the south west corner of township number three north of range four west, thence east to the south east corner of township number three north, of range number one east, to the third principal meridian line; thence north to the boundary line of the territory; thence west with said boundary line so far that a south line will pass between ranges four and five west; thence south with said line to the beginning, shall constitute a separate county, to be called *Bond*; and the seat of justice for said county shall be at Hill's fort, until it shall be permanently established in the following manner, that is to say, there shall be five persons appointed, to-wit:—William Roberts, John Powers, Robert Gillaspie, John Whitley, senior and John Loston, who or a majority of them, being duly sworn before some judge or justice of the peace of this territory, to faithfully take into view the situation of the settlements, the geography of the county, the convenience of the people, and the eligibility of the place, shall meet on the first Monday in March next at Hill's fort on Shoal creek, and proceed to examine and determine on the place for the permanent seat of justice, and designate the same: *Provided*, that the proprietor or proprietors of the land shall give to the said county for the purpose of erecting public buildings, a quantity of land at the said place not less than twenty acres, to be laid off in lots and sold for the above purpose, but should the said proprietor or proprietors refuse or neglect to make the donation aforesaid, then and in that case it shall be the duty of the commissioners to fix upon some other place for the seat of justice, as convenient as may be to the present and future settlements of said county, or should the said commis-

sioners fix it upon lands belonging to the United States, in that case, the judges of said county or any two of them may apply to the Register of the land office for their district, and in behalf of the county purchase one quarter section for the use of the county, and the seat of justice shall be established thereon, and the county shall be bound for the purchase money; which place when fixed upon and determined, the said commissioners shall certify under their hands and seals, and return their certificate of the same to the next county court in the county aforesaid; and as a compensation for their services they shall each be allowed two dollars for every day they may be necessarily employed in fixing the aforesaid seat of justice, to be paid out of the county levy, which said court shall cause an entry thereof to be made on their records.

SEC. 2. Be it further enacted, That the citizens of Madison and Bond counties, that are entitled to vote, may at any election for a member of the legislative council and house of representatives to represent said district, proceed to vote at their respective seats of justice for such members; and it shall moreover be the duty of the sheriff of the said county of Bond, within ten days after the close of said election, to attend at the court-house of the county of Madison with a statement of the votes given in the said county of Bond, to compare the polls of the respective counties; and it shall be the duty of the sheriffs of Madison and Bond to attend at such time and place with a statement of the votes of Madison and Bond counties, and upon counting the votes of the said counties, it shall be the duty of the sheriffs of Madison and Bond counties to make out and deliver to the persons duly elected a certificate thereof. If the said sheriffs or either of them shall refuse or fail to perform the duty required of them by this section, such delinquent shall forfeit and pay the sum of two hundred dollars, to be recovered by action of debt or indictment, one half to the use of the territory, the other half to the person suing for the same.

SEC. 3. Be it further enacted, That the citizens of the said county of Bond, are hereby declared to be entitled in all respects to the same rights and privileges in the election of a delegate to congress of this territory, that are by law allowed to other counties of this territory; and all elections are to be conducted at the same time and in the same manner as is provided for other counties. This act shall

commence and be in force from and after its passage.

GEO. FISHER,
Speaker of the House of Representatives.

PIERRE MENARD.

President of the Legislative Council.

Approved—January 4, 1817.

NINIAN EDWARDS.

AN ACT *regulating and defining the duties of the United States'*
Judges for the Territory of Illinois.

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, that the Illinois territory shall be divided into three circuits, in the manner and for the purposes hereinafter mentioned.

SEC. 2. And be it further enacted, That the counties of Bond, Madison, St. Clair, and Monroe, shall compose the first circuit; the counties of Randolph, Jackson, Johnson and Pope, shall compose the second circuit; the counties of Gallatin, White, Edwards and Crawford, shall compose the third circuit: *Provided however*, that when a new county shall at any time hereafter be established, such new county shall be attached to the Judicial circuit from which the largest portion thereof may be taken and it shall be the duty of the Judge, allotted as hereinafter directed, to hold courts in such new county at such time and place as may be directed by law.

SEC. 3. And be it further enacted, That the judges who are or shall be appointed for the Illinois territory, under the authority of the United States, shall previous to the time prescribed by this act, for holding the first court proceed to allot amongst themselves the circuits in which they shall respectively preside, which allotment shall continue in force for and during the term of one year thereafter, and such allotment shall be annually renewed, and which allotment in writing, signed by the said judges or a majority of them, shall be entered of record, in the said courts respectively, by the clerks thereof, at the commencement of the term next after such allotment shall be made: *Provided however*, that when any of the said judges shall be unable to hold the courts within the circuit to which he is allotted by reason of any disability, it shall be the duty of the judge allotted to the circuit nearest thereto, to hold the court in such circuit until the disability of the judge allotted to the circuit shall be

removed, or (in case of death or resignation of a judge) until a successor be appointed.

SEC. 4. And be it further enacted, That it shall be the duty of said judges respectively, to hold three terms in each county annually in their respective circuits in conformity with the preceding section of this act, which shall commence at the times hereinafter mentioned, that is to say, in the county of Bond, on the last Mondays of February, June and October; in Madison county on the first Mondays of March, July and November; in St. Clair county, on the second Mondays of March, July and November; in the county of Monroe on the third Mondays of March, July and November; in Randolph county on the fourth Mondays of March, July and November; in Jackson county on the first Mondays in April, August and December; in Johnson county on the second Mondays of April, August and December; in Pope county, on the third Mondays in April, August and December; in Gallatin county on the fourth Mondays in April, August and December; in the county of White on the first Mondays in May, September and January; in Edwards county on the second Mondays of May, September and January; in Crawford county on the third Mondays of May, September and January.

SEC. 5. And be it further enacted, That the said courts shall be holden at the respective county seats of justice of said counties, and the said judges respectively shall in their respective circuits have jurisdiction over all causes, matters or things, at common law or in chancery, arising in each of said counties, except in cases where the debt or demand shall be under twenty dollars, in which cases they shall have no jurisdiction.

SEC. 6. And be further enacted, That the circuit courts in the respective counties, shall have power and jurisdiction in all cases of vagrants, attachments, divorces, motions against public debtors, clerks, sheriffs, collectors of public monies for the territory, or any county thereof, and of all matters and things, civil or criminal which the circuit courts in this territory had and possessed before the passage of this act, unless in cases specially otherwise provided for by law; and the said judges in their respective circuits, shall in term and in vacation possess the same powers, and perform the same duties in matters cognizable by the circuit courts, as they held and possessed the same before the passage of this act, and that the said judges shall be conservators of the peace; and the circuit courts in term time or

the judges thereof in vacation, shall have power to award injunctions, writs of ne exeat, habeas corpus, and all other writs and process that may be necessary to the execution of the powers with which they are or may be vested.

SEC. 7. And be it further enacted, That the said circuit courts respectively, shall have power to hear and determine all treasons, felonies, and other crimes and misdemeanors that may be committed within the respective counties, and that may be brought before them respectively by any rules or regulations prescribed by law; and when any person charged with felony, shall be committed to prison in any county within the territory, and there shall be forty days or more between the time of the commitment and the next term of the circuit court, directed to be holden in the county in which such person may be committed, it shall be lawful for the governor of the territory to issue his writ directed to the judge allotted to the circuit, including the county where such accused person may be committed, commanding him to hold a court of oyer and terminer for the trial of the accused; and it shall be the duty of the judge to whom said writ is directed, to hold the court at the seat of justice of the county at such time as may be specified in such writ, and all process issued, or proceedings had before the writ shall be issued, shall be returned to the said court of oyer and terminer.

SEC. 8. And be it further enacted, That all suits shall be tried in the counties in which they originate, unless in cases that are or may be specially provided for by law. And executions and other process may be issued on any judgment or decree of any circuit court, and be returned according to law.

SEC. 9. And be it further enacted, That if the circuit judge shall not attend on the first day of any court, or if a quorum of the court hereinafter mentioned, shall not attend in like manner, such court shall stand adjourned from day to day, until a court shall be made, if that shall happen before four o'clock, in the afternoon of the third day.

SEC. 10. And be it further enacted, That if either a circuit court, or the court hereinafter mentioned, shall not set in any term, or shall not continue to set the whole term, or before the end of the term, shall not have heard and determined all matters and things depending in court, the business undetermined shall stand continued until the next succeeding term.

SEC. 11. And be it further enacted, That if from any cause, either of the said courts shall not set on any day in a term after it shall have opened, there shall be no discontinuance, but so soon as the cause is removed, the court shall proceed to business until the end of the term, if the business depending before it be not sooner dispatched.

SEC. 12. And be it further enacted, That the judicial term of the said circuit courts shall consist of six days in each county, during which time the court shall set, unless the business before it shall be sooner determined.

SEC. 13. And be it further enacted, That the judge allotted as aforesaid, to any circuit within the said territory, shall have power to appoint a clerk to each court within the circuit allotted to him, and to fill any vacancy occasioned by death, removal from office, or resignation of any clerk, and any clerk so appointed shall at the first term to be holden in the county, enter into bond with one or more securities to be approved by the court, to the governor of the territory, and his successors in office, in the penalty of one thousand dollars, conditioned for the faithful discharge of the duties of his office according to law; and to deliver the books, papers, records and proceedings to his successors in office, whole, safe and undefaced, without sequestration or omission; which bond shall be transmitted to and filed in the secretary's office. It shall be the duty of the clerk to issue process in all causes originating in his county, to keep and preserve the records of all the proceedings of the court therein, and to do and perform all the duties which may be enjoined on him by law.

SEC. 14. And be it further enacted, that in the cases depending in the respective circuit courts in this territory, before the passage of this act, the parties, or their attornies, or counsellors, shall be permitted to take all such measures for bringing them to trial that might have been taken, if no change had taken place; and the said circuit courts established by this act respectively, shall as far as possible proceed to the trial thereof, in the manner that the circuit courts before the passage of this act might have legally done, had no other change than a mere alteration of the terms taken place, and all writs, process and proceedings whatsoever in any court in this territory shall be considered as continued to and made returnable to the first term of the circuit court to be holden in the county under this act, and be proceeded on accordingly, recognizances or other proceedings taken by justices of the peace or other officers, made returnable heretofore

to the circuit courts, shall in like manner be returned to, and be proceeded on as above directed.

SEC. 15. And be it further enacted, That the said judges or a majority of them, shall constitute a court to be styled, a court of Appeals for Illinois territory, and shall hold two sessions annually at Kaskaskia, which shall commence on the second Mondays in June and October, in every year, and continue in session until the business before them shall be completed, which court shall have appellate jurisdiction only, except cases arising under the laws of the United States, and of which provision may be made authorizing them to exercise such jurisdiction, and to which appeals may be allowed, and from which writs of error according to the principles of the common law, and conformably to the laws and usages of this territory, may be prosecuted for the reversal of the judgments and decrees, as well of the said circuit courts, as of any inferior courts, which now are, or which may hereafter be established by law.

SEC. 16. And be it further enacted, That a clerk shall be appointed to the said court of appeals, by the said judges or a majority of them, whose duty it shall be to issue process in all cases brought before said court where process ought to issue, and keep and preserve the records of all the proceedings of the said court therein, and to do and perform all such duties as may be enjoined on him by law; and the said clerk shall at the first term of the said court after his appointment, give bond to the governor and his successors in office, with one or more securities to be approved of by said court, in the penalty of one thousand dollars, conditioned for the faithful discharge of the duties of his office, according to law, and to deliver all books, papers, records and proceedings of his office, to his successors in office, whole, safe and undefaced without sequestration or omission; which bond shall be transmitted to, and filed in the secretary's office.

SEC. 17. And be it further enacted, That in all cases depending in the court of appeals for Illinois territory, before the passage of this act, the parties or their attornies, or counsellors, shall be permitted to take all such measures to bring them to a final decision, that might have been taken if no change had taken place; and the said court of appeals established by this act, shall as far as practicable proceed to the final determination thereof, in the same manner that the court of appeals heretofore might have legally done, had no other change than a mere alteration of the terms taken place, and executions and

other process may be issued on any judgments or decrees of the said court of appeals, and be made returnable according to law.

SEC. 18. And be it further enacted, That appeals may be prayed, and writs of error taken out upon matters of law only, in all cases wherein they are now allowed or may hereafter be allowed by law to the said court of appeals, and made returnable to the said court at Kaskaskia; but no question upon appeal or writ of error shall be decided without the concurrence of two judges, at least.

SEC. 19. And be it further enacted, That the rules of practice in civil and in criminal proceedings at law, and the laws and rules respecting proceedings in chancery, which were exercised by the circuit courts and court of appeals before the passage of this act, and not inconsistent with this law, shall be, and are hereby vested in the circuit courts and court of appeals established by this act, and shall govern the same, and shall be pursued by parties litigant therein, and in all cases not provided for by law, the said courts respectively shall have power to adopt rules and regulations necessary for effectuating the practice in them respectively, and the said courts in term, and the judges thereof in vacation shall have full power and authority to punish contempts which may be offered to them in the exercise of their official functions, in the same manner as they might or could do before the passage of this act according to law.

SEC. 20. And be it further enacted, That the clerks of the circuit courts and court of appeals established before the passage of this act, shall deliver to the clerks who may be appointed under the provisions of this law, all the books, papers, records and proceedings of the respective circuit courts which shall appertain to their offices, and in case of neglect or refusal to do so in a reasonable time after demand is made, the courts respectively, where such neglect or refusal shall happen, may on motion or application, or without it, award such coercive process as may be deemed expedient to enforce the delivery, according to law.

SEC. 21. And be it further enacted, That the said circuit courts respectively, shall cause to be procured and used a judicial seal in each county in the respective circuits, which shall be kept by the respective clerks, and all writs and process from said court shall be in the name of the United States, and be sealed with the judicial seal; bear teste in the name of the clerk; be dated on the days which they issue, and made returnable to the said courts according to law.

SEC. 22. And be it further enacted, That it shall be the duty of the court of appeals in all cases of appeals and writs of error, to state the cases and the reasons of their opinion at large in writing, which shall be carefully preserved by the clerk and kept subject to the inspection of all who may desire to read the same.

SEC. 23. And be it further enacted, That executions may be issued by the clerks to be appointed under this act, on all judgments and decrees heretofore rendered by the respective circuit courts and court of appeals, and be made returnable according to law in the same manner as if this law had not been passed.

SEC. 24. And be it further enacted, That the clerks of the respective circuit courts, and the clerk of the court of appeals to be appointed under this law, shall be entitled to the same fees and emoluments, and entitled to the same mode of recovery and collection, which the clerks of the circuit courts, and courts of common pleas, and clerks of the court of appeals and general court were allowed to have in similar cases, and shall make complete records in all cases determined in their respective courts where the title to land shall come in question, and they shall keep their office at the places directed by law for holding their respective courts.

SEC. 25. And be it further enacted, That it shall be the duty of the sheriff in each county respectively, to attend and execute the process and orders of the courts, directed by this law to be held in his county, and it shall be his duty to summon grand and petit jurors, to attend the circuit courts and courts of oyer and terminer, to be holden in his county, in the same manner as the respective sheriffs were required to do by law before the passage of this act; and all persons summoned by the sheriffs to attend as jurors and failing to give their attendance, shall be subject to the same penalties and be proceeded against in the same manner as jurors were for like failures before the passage of this act: *Provided nevertheless*, that the clerks that are now in office in the different circuit courts and the court of appeals in this territory, shall continue in office, and perform all the duties required by law until there are new clerks appointed agreeably to the provisions of this act. This act to take effect

and be in force from and after the rising of the legislature.

GEO. FISHER,

Speaker of the House of Representatives.

JOHN G. LOFTON,

President of the Legislative Council pro tempore.

Approved—January 6, 1817.

NINIAN EDWARDS.

AN ACT *supplemental to an act entitled, “An act regulating and defining the duties of the United States’ Judges, for the territory of Illinois.”*

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, that the United States’ Judges appointed for this territory, respectively, are hereby empowered to hold circuit courts at the times prescribed by the act to which this is a supplement, in the several counties now included within the circuits to which they have hitherto been allotted, until the court of appeals at their first session shall otherwise allot, and after which allotment, the said judges shall be governed by the law to which this is a supplement.—*Provided however*, that when any judge shall be unable to attend the courts in his circuit, it shall be the duty of the judge who is to preside in the courts next to be holden after the completion of the circuit, in which such absent judge should attend to hold the courts in such circuit, during such disability: and in case of death, or resignation, to hold the courts until a successor shall be appointed, any thing in any law to the contrary notwithstanding.

SEC. 2. Be it further enacted, That in those counties wherein no clerk of the circuit court has been appointed the clerks of the county courts in such counties, are hereby authorised and empowered to do and perform all the duties required of the several clerks of the circuit courts by the act to which this is a supplement; and the said clerks of the county courts shall continue to perform such duties until a clerk for the circuit court shall be appointed according to the provisions of the act to which this is a supplement; and such clerk shall receive the same fees as clerks of the circuit courts are entitled to for similar services.

SEC. 3. Be it further enacted, That the clerks of the said circuit courts, shall be authorised to use their private seal in all cases where

they are required to use their judicial seal, until such judicial seals can be procured.

SEC. 4. Be it further enacted, That the clerks of the circuit courts respectively, when appointed, shall hold their offices during good behaviour, and be subject to be removed only by impeachment, in the usual way of trying impeachments. This act to be in force from and after the passage thereof.

SETH GARD,

Speaker of the House of Representatives, pro tempore.

PIERRE MENARD,

President of the Legislative Council.

Approved—January 10, 1817.

NINIAN EDWARDS.

AN ACT *regulating the time of holding the County Courts.*

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That the county courts for the counties of Bond, Randolph and Gallatin, shall be holden on the first Mondays of February, June and October: In the counties of Madison, Jackson and White, on the second Mondays of February, June and October: In the counties of St. Clair, Johnson and Edwards, on the third Mondays in February, June and October: In the counties of Monroe, Pope and Crawford, on the fourth Mondays in February, June and October, in each and every year.

SEC. 2. And be it further enacted, That all process heretofore made returnable to the county courts, shall be continued and made returnable to the county courts, in the same manner as though no alteration had taken place in the terms: *Provided*, that this act shall not be so construed as to effect the powers already vested in the circuit courts now established in this territory.

SEC. 3. Be it further enacted, That so much of the act past last session relative to county courts, as prescribes the times of holding courts, be, and the same is hereby repealed. This act to take effect from and after its passage.

SETH GARD,

Speaker of the House of Representatives, pro tempore.

PIERRE MENARD,

President of the Legislative Council.

Approved—January 11, 1817.

NINIAN EDWARDS.

AN ACT to authorize the Governor to organize the Militia of Edwards and Crawford counties.

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, that it shall and may be lawful for the governor of this territory, immediately to constitute the militia of Crawford county into one battalion, and that the counties of Edwards and Crawford, shall form a regiment; the commanding officer of which, shall have the same powers and perform the same duties that other lieutenant colonels of their respective regiments perform. This act to take effect and be in force from and after its passage.

SETH GARD,

Speaker of the House of Representatives, pro tempore.

PIERRE MENARD,

President of the Legislative Council.

Approved—January 11, 1817.

NINIAN EDWARDS.

AN ACT to amend an act entitled, “an act to amend an act entitled an act for levying and collecting a tax on land,” passed the 24th December, 1814.

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, that so much of the first section of the said recited act, as makes it the duty of the territorial auditor, to apply for or procure from the several Registers of the land offices in this territory, abstracts of all lands by them sold to individuals, the same is hereby repealed. This act to take effect from and after its passage.

GEO. FISHER,

Speaker of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—January 11, 1817.

NINIAN EDWARDS.

AN ACT to provide for the collection of the county levy and territorial tax, in the county of Gallatin, for the year 1816.

Be it enacted by the Legislative Council and House of Representatives of Illinois territory, and it is hereby enacted by the authority

of the same, that the lists of taxable property and land tax, made by the county treasurer of the county of Gallatin, for the year 1816, be, and the same is hereby declared to be legal, and he shall be entitled to the same compensation therefor, as if the same had been done within the time prescribed by law.

SEC. 2. Be it further enacted, That the sheriff of said county is hereby authorised and empowered to collect the taxes of said county for the year one thousand eight hundred and sixteen, in the same manner as if the lists had been delivered to him agreeably to law; and it shall be his duty to settle for the same on or before the first day of July next. This act to be in force from and after its passage.

GEO. FISHER,

Speaker of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—January 11, 1817.

NINIAN EDWARDS.

AN ACT for the appointment of Circuit Attornies.

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, that there shall be appointed to each judicial circuit of this territory, a prosecuting attorney, who shall be styled and called "Circuit Attorney;" and it shall be the duty of said attornies to prosecute in all cases according to law.

SEC. 2. Be it further enacted, That it shall be the duty of the said circuit attornies in their respective circuits to keep a journal or memorandum of all cases arising within their respective circuits; in the prosecution of which, there shall appear to be any defect in the criminal laws of the territory, and make a report of all such apparent defects to the legislature annually, for the purpose of enabling them to make such amendments as will tend to perfect our criminal code.

SEC. 3. Be it further enacted, That it shall be the duty of the said circuit attornies, to do and perform all the duties now enjoined on the prosecuting attornies of this territory, and as a compensation for their services, they shall receive eighty dollars, quarter yearly out of the public treasury, and they shall also receive the sum of ten dollars in all prosecutions for felony, when the party prosecuted shall

be convicted, for each and every person prosecuted, and for every indictment or presentment, where the offence shall not amount to felony, where the party prosecuted shall be convicted, for every person so prosecuted, the sum of five dollars.

SEC. 4. Be it further enacted, That when the said circuit attorneys, respectively shall be unable to attend to discharge their official duties, they shall have the right, and are hereby empowered to appoint, under their hands and seals, a deputy to act in his stead, who shall be entitled to the same fees, and the rights and privileges in court, that the said circuit attorneys themselves would have.

SEC. 5. Be it further enacted, That it shall be the duty of the said circuit attorneys, to take the usual oaths of office prescribed by law to be taken by all officers in this territory.

This act to take effect from and after the passage.

SETH GARD,

Speaker of the House of Representatives pro tempore.

PIERRE MENARD;

President of the Legislative Council.

Approved—January 11, 1817.

NINIAN EDWARDS.

AN ACT altering the mode of taking in lists of taxable property.

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, that the lists of taxable property in this territory shall hereafter be taken in and ascertained in the form and manner following, viz:

That the county courts of every county, shall at their first court after the first day of January yearly and every year appoint some fit person in each township within the county, to receive and take in all lists of taxable property, subject to county and territorial tax within the same; and each person so appointed by virtue of this act, for the purpose of taking in lists of taxable property, shall before he begins to exercise the duties of his office, take and subscribe to the following oath or affirmation, before some justice of the peace: "I, A. B. do solemnly swear or affirm, as the case may be, that I will to the best of my knowledge, diligently and faithfully execute the duties of a commissioner to which I am appointed agreeably to law, without favor or affection or partiality, so help me God." A certificate of which

oath so taken and subscribed, shall be transmitted by the justice administering the same to the clerk of the county court, whose duty it shall be to file and preserve the same; and the person so appointed in each township, shall advertise in the respective townships of their counties, that he will attend on a certain day, not less than ten days thereafter, at some place that he may suppose most convenient to the inhabitants within the same for the purpose of receiving and taking in their several lists of property subject to taxation. And each and every person possessing or having the care of property subject to taxation within the township, are hereby required to attend at such place or places as said commissioner may appoint in manner aforesaid.

SEC. 2. Be it further enacted, That it shall be the duty of the commissioner so appointed by the court aforesaid, to attend at the time and place by him advertised as aforesaid, and take in and receive lists of taxable property, from each and every person who shall attend to give in the same. And the said commissioner is hereby authorized and required to administer to each person giving in his or her list of taxable property, the following oath or affirmation, to wit: "I, A B, do solemnly swear or affirm as the case may be, that this list contains a true and perfect account of all persons, and every species of property belonging to or in my possession, or care, subject to taxation, and that no contract, change or removal whatever of property has been made or entered into, or any other mode advised or used to evade the payment of taxes."

SEC. 3. Be it further enacted, That every person subject to taxation who shall fail or refuse to attend at the time and place so advertised as aforesaid, for the purpose of giving in his or her list of taxable property, shall have ten days given him or her thereafter to attend at the house of the said commissioner to give in the same, which shall be received by him in the same manner and form as if he or she had attended at the time and place appointed as aforesaid, or to transmit his or her list of taxable property to the said commissioner accompanied with like affidavit as is required by this act.

SEC. 4. Be it further enacted, That if any person shall give, transmit or deliver to the person authorized as aforesaid to receive lists of taxable property, a fraudulent list of property subject to taxation, or shall fail or refuse to attend and give in his list on oath or affirmation, or to transmit the same, or giving or transmitting a fraudulent list shall be liable to pay a fine of five dollars, and the

person so appointed by the court to receive such list, shall proceed to list his or her property agreeably to the best information he can procure, and all such property so enlisted shall be subject to treble tax, to be collected and distrained for by the sheriff as in other cases; which fine and treble tax, shall be recovered in the county court by the following mode of procedure, and shall be applied as hereinafter directed.

SEC. 5. Be it further enacted, That the person so appointed by the court as aforesaid, shall give information to the county court in person, if he is able to attend, if not, in writing, any time before the first day of August yearly and every year, of all such persons as shall have so failed, or given in a false or fraudulent list of their taxable property, and the said court shall forthwith direct their clerk to issue a summons requiring the party to attend at the next term of their said county court, to shew cause, if any, why he or she shall not be fined and treble taxed for failing to deliver his or her list, or giving in a false or fraudulent list as the case may be. And any person or persons being served therewith by the sheriffs, may appear and defend the same, and the court shall proceed to enquire into and decide the same in a summary way according to the justice of the case. And if the defendant be found guilty by the court, they shall give judgment and award execution thereon for the fine and treble tax together with costs; but for good cause shewn, the court may continue the same until the next term. And on judgment being given against any delinquent as aforesaid, the court shall certify the amount to the auditor and sheriff, who shall collect and account for the same as other taxes are.

SEC. 6. Be it further enacted, That each person so appointed to receive lists of taxable property as aforesaid, after having collected the same in his district in manner as before described, shall deliver the same to the clerk of the county court for the said county in which the person giving in such list of taxable property resides on or before the first day of June. And the said clerk shall proceed to make out therefrom lists in alphabetical order of all persons and property subject to taxation in the present usual form, and shall examine said lists, and certify them to be correct to the different officers entitled to them by law, and the clerk shall be entitled to the same compensation, as is already provided for such services.

SEC. 7. Be it further enacted, That the person so appointed to take in lists of taxable property as aforesaid, shall be exempt from

doing militia duty, working on the highways or serving as jurors, for one year from and after the time of his appointment as aforesaid.

SEC. 8. Be it further enacted, That the persons so appointed by the county court for the purpose of taking in lists of taxable property, or the clerk of any such county court failing to perform any one of the duties imposed upon them by this act shall be subject to a fine of not exceeding one hundred dollars to be recovered in the same way that is directed by law.

SEC. 9. Be it further enacted, That all laws or parts of laws, which come within the perview of this act, and so much of all laws or parts of laws, as creates a county treasurer, in the several counties in this territory and so much of any law which allows the prosecuting attorney the sum of ten dollars for aiding and assisting the several county courts to settle with the treasurer heretofore appointed, be, and the same are hereby repealed.

SEC. 10. Be it further enacted, That the sheriffs of the respective counties, are hereby required to collect and pay over all monies to the orders of the county courts, in the same manner that the county treasurers were required to do, and shall in all respects perform the same duties that the respective county treasurers were required to perform so far as is not inconsistent with the preceding provisions of this act. And the said county treasurers are hereby required to give up all the books and papers as well as monies appertaining to their offices respectively to the sheriffs of their respective counties in a reasonable time after the passage of this act. And the said sheriffs shall receive as a full compensation for their services, as collectors and county treasurers, out of the county funds of their counties respectively, ten per cent. on all monies so collected and paid out. This act to be in force from and after the passage thereof.

GEO. FISHER,

Speaker of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—January 11, 1817.

NINIAN EDWARDS.

AN ACT supplemental to act concerning Justices of the Peace.

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the author-

ity of the same, That the several justices of the peace within this territory, shall have cognizance in all cases wherein the demand or debt shall not exceed the sum of forty dollars, in which cases they may give judgment and award execution, and in all respects be governed by the laws now in force in this territory regulating the jurisdiction of justices of the peace, except so much of the tenth section of the law passed the twenty-fourth day of December, one thousand eight hundred and fourteen, which gives the said justices jurisdiction of twenty dollars only; which section or so much of it as comes within the per-view of this act, be and the same is hereby repealed.

SEC. 2. Be it further enacted, That in all cases where the debt or demand shall exceed twenty dollars, it shall be the duty of said justice of the peace to hold his court monthly, and either plaintiff or defendant shall be entitled to a trial by jury, by giving notice either personally or in writing to the said justice of the peace five days previous to the day of the trial; and it shall be the duty of the said justice on receiving such notice, to issue his venire directing the constable to summon twelve good and lawful men to attend to try the suit or suits before him depending, noting the day on which the same is to be tried; and the party at whose request the jury may have been summoned, shall pay to each juror who shall attend to try the cause, the sum of fifty cents; but should the plaintiff and defendant both request a jury and give notice as is required by this act, then and in that case, the jury fees shall abide the event of the suit, and be taxed in a bill with other costs; and the justice of the peace shall be entitled to fifty cents for summoning and swearing the jury; and the constable shall be entitled to twelve and an half cents for serving on each juror, and mileage to the most distant place of service on one precept.

SEC. 3. Be it further enacted, That appeals taken from the judgment of a justice of the peace in this territory, shall be tried in the county courts, and shall in all cases be proceeded on as is now directed by law. This act to be in force from and after its passage.

GEO. FISHER,

Speaker of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—January 11, 1817.

NINIAN EDWARDS.

AN ACT concerning the courts of Jackson county.

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, that the respective courts for the county of Jackson, shall hereafter be holden at the town of Brownville, and not at the house of Nathan Davis, as was heretofore required by law. This act to be in force from and after its passage.

GEO. FISHER,

Speaker of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—January 11, 1817.

NINIAN EDWARDS.

AN ACT to authorize the collection of monies due from the citizens of Bond and Crawford counties to the counties of Madison and Edwards, and for other purposes.

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, that all monies or arrearages of taxes due, which it would have been the duty of the sheriffs of Madison and Edwards counties to have collected in the new counties of Bond and Crawford, had those counties not have been established, shall be collected in the same manner by the said sheriffs of Madison and Edwards, as though said counties had not been stricken off; and it shall be the duty of the clerks to issue executions on all judgments now rendered, or which may hereafter be rendered in the said counties of Madison and Edwards, against the citizens of the said counties of Bond and Crawford.

SEC. 2. And be it further enacted, That it shall be the duty of the clerks of the circuit and county courts in said counties to issue process in suits that have been instituted in the said courts, to compel the attendance of witnesses at the trial of said causes, in the same manner that they would have done, if those counties had not been erected; and it shall be the duty of the sheriffs of the said counties of Madison and Edwards, to execute the same.

SEC. 3. And be it further enacted, That it shall be the duty of the clerks of the circuit courts in those counties in which the circuit courts have been heretofore extended, and to which any portion of any

county in which the said circuit courts were not established was attached to issue process in all cases in those counties or parts of counties, to procure the attendance of witnesses to attend the trial of any causes now depending in said circuit courts, and to issue all process necessary to the final and ultimate determination of all suits that remain in any wise undetermined in the said counties; and it shall be the duty of the sheriffs of those counties from which such process issued, to execute and return the same as heretofore.

This act to take effect from and after its passage.

GEO. FISHER,

Speaker of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—January 11, 1817.

NINIAN EDWARDS.

*AN ACT making appropriations for the year 1817, and for
other purposes.*

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, that the same contingent fund shall be allowed, and subject to be appropriated in the same manner that was allowed for the year 1816.

SEC. 2. Be it further enacted, That there shall be paid out of the territorial treasury, on the warrant of the auditor of public accounts, to each member of the legislative council and house of representatives, the sum of three dollars per day for each day's attendance at the present session of the legislature, and at the rate of three dollars for every twenty miles travel to and from the seat of government to their places of residence by the most usual road.

To the secretary of the legislative council and clerk of the house of representatives for their services at the present session, the sum of four dollars per day for every day's attendance at the present session: And to the engrossing and enrolling clerk, the sum of four dollars per day: And to the door keeper of both houses, three dollars per day for each day's attendance at the present session.

SEC. 3. Be it further enacted, That the compensation which may be due to the members and officers of the legislative council, shall be certified by the secretary thereof; and the secretary's by the presi-

dent thereof. And that which may be due to the members of the house of representatives, including the enrolling clerk and door-keeper, by the clerk thereof; and the clerk's by the speaker thereof; which certificate shall be sufficient evidence to the auditor of the claim, and he shall thereupon issue a warrant or warrants to the person so entitled on the territorial treasury for the amount of his certificate, which warrants as well as all other warrants, shall draw interest until paid at the treasury.

SEC. 4. Be it further enacted, That the following shall continue for one year, commencing on the first day of January, eighteen hundred and seventeen, to be the salaries of certain officers, as follows to wit: To the auditor of public accounts, the sum of three hundred dollars; to the territorial treasurer, the sum of two hundred dollars.

SEC. 5. There shall be paid out of the general fund to the following persons, the following sums to wit: To William Morrison, for house rent furnished the present session, the sum of one dollar and fifty cents per day: To Hugh H. Maxwell, the sum of fifteen dollars twenty five cents for stationary &c. for the use of the legislature: to Michael Beavienue for wood furnished the legislature, twenty-one dollars twenty-five cents; to William C. Greenup, for a seal furnished the court of appeals, twenty-five dollars, which if paid by the United States, shall be refunded to the territory: to William Bennet for house rent and fire wood, for two days during the present session, the sum of two dollars per day: to Isaac Basey for his services as door-keeper, for the two first days of the present session, the sum of three dollars per day: to Samuel Omelvany for taking a list of persons subject to a poll tax in the county of Gallatin for the year 1813, \$34: to Daniel P. Cook, auditor of public accounts for postage on public papers transmitted to his office, the sum of seven dollars and fifty cents: to William Morrison for stationary, six dollars; to Hugh H. Maxwell, for acting as auditor for twelve days during the last session, forty dollars.

This act to take effect from and after its passage.

GEO. FISHER,

Speaker of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—January 13, 1817.

NINIAN EDWARDS.

AN ACT *defining the duties of clerks in granting letters of administration and for other purposes.*

WHEREAS it has been represented to this legislature, that sundry persons under the present existing laws of the territory have taken out letters of administration on the estate of other persons, who were actually living; and whereas much inconvenience may arise to the good people of this territory in consequence of such a mode of proceeding: for remedy whereof,

Be it enacted by the Legislative Council and House of Representatives of Illinois territory, and it is hereby enacted by the authority of the same, that it shall be the duty of the several clerks of the county courts in this territory, who are or shall hereafter be authorised to grant letters testamentary or letters of administration, to require the persons applying for such letters testamentary or letters of administration, to make proof that the person on whose estate he, she or they are about to administer, is actually dead, which proof may be made either by the oath or affirmation of some creditable witness or witnesses, or by the oath or affirmation of such applicant.

SEC. 2. And be it further enacted, That if any clerk shall grant letters testamentary or letters of administration without first taking such proof of the death of any decedent, the said clerk so offending, shall forfeit and pay the sum of five hundred dollars, one half for the use of the territory, and the other to the person suing for the same, and be liable to a suit for damages to double the amount of the estate so administered on, to be recovered in any court having competent jurisdiction thereof.

SEC. 3. Be it further enacted, That if any person or persons, shall fraudulently obtain any letters testamentary or letters of administration, by making a false statement or by causing any person to make such false statement for them, every such person shall be deemed guilty of perjury, and be punished accordingly; and all such letters testamentary and letters of administration, that shall be so fraudulently obtained, shall be considered null and void.

This act to commence and be in force from and after its passage.

GEO. FISHER,

Speaker of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—January 14, 1817.

NINIAN EDWARDS.

AN ACT to explain the law regulating sheriffs fees in certain cases.

WHEREAS doubts have arisen as to the construction of the laws allowing commission to sheriffs and fees for levying executions: for remedy whereof,

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, that for levying every execution the sheriff levying the same shall be allowed fifty cents, for proceeding to sell, if the property be actually sold, the commission to the sheriff shall be five per centum on the first three hundred dollars, and two per centum on all sums above that, and one half of such commission when the money is paid to the sheriff without seizure, or where the lands and goods seized or taken shall not be sold. This act to be in force from and after its passage.

GEO. FISHER,

Speaker of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—January 14, 1817.

NINIAN EDWARDS.

RESOLUTIONS.

Resolution respecting the distribution of the Laws and Journals of this session.

RESOLVED, By the Legislative Council and House of Representatives of the Illinois territory, That it shall be the duty of the Secretary of the territory, to ascertain the number of officers entitled to the laws of the territory in each county, and forward the same number of the laws of this territory, passed at the present session, to each clerk of the county courts respectively, with instructions to such clerks to distribute them amongst said officers. And it shall be his duty also to send to each county such a number of the journals as they may be respectively entitled to in proportion to the number of voters in each county as appears by the last election returns filed in his office, which shall be forwarded so soon as they are deposited in his office. And it shall be the duty of the clerks respectively to distribute the same amongst the inhabitants of each township of their respective counties.

GEO. FISHER,
Speaker of the house of Representatives.

PIERRE MENARD,
President of the Legislative Council.

Approved—January 14, 1817.

NINIAN EDWARDS.

RESOLVED, By the Legislative Council and House of Representatives of the Illinois territory, that Elias K. Kane, esq. be and he is hereby appointed to superintend the printing of the laws of this session of the Legislature and to furnish a copy thereof for the printer; and it shall be his further duty to place an index to the same. And it shall be the duty of Messrs. Cook & Blackwell, to procure a certificate from the secretary of the territory of their having printed and delivered in his office the number of copies, both of the journals and laws which they have contracted to print, and it shall be the duty of the secretary to estimate what they shall be entitled to, and certify the same to the auditor, who shall issue his warrant for that amount, on the territorial treasury.

GEO. FISHER,
Speaker of the House of Representatives.

PIERRE MENARD,
President of the Legislative Council.

Approved—January 14, 1817.

NINIAN EDWARDS.

LAWS

PASSED

BY THE GENERAL ASSEMBLY

OF

ILLINOIS TERRITORY,

AT THEIR SIXTH SESSION,

HELD AT KASKASKIA—1817—'18.

KASKASKIA, I. T.

BERRY AND BLACKWELL—PRINTERS TO THE TERRITORY.

1818.

[Reprinted from the first edition.]

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LAWS.

AN ACT *to repeal part of an act entitled an act supplementary to an act entitled, an act establishing Ferries.*

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That the last section of the above recited act, which compels owners or occupiers of ferries to pass Preachers of the Gospel free of ferriage, shall be, and the same is hereby repealed.

SEC. 2. And be it further enacted, That this act shall take effect from and after its passage.

GEORGE FISHER,
Speaker of the House of Representatives.
PIERRE MENARD,
President of the Legislative Council.

Approved—December 17, 1817.

NINIAN EDWARDS.

AN ACT *regulating and defining the duty of Justices of the Peace in certain cases.*

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That it shall be the duty of each Justice of the Peace in the territory, to pay over all monies which he may have collected, immediately when called on, at his own house, by the person or persons to whom such money is due, on pain of forfeiting twenty dollars, to be sued for and recovered before any justice of the peace for the county, for the use of the person or persons injured.

This act to take effect and be in force from and after the first day of March next.

GEORGE FISHER,
Speaker of the House of Representatives.
PIERRE MENARD,
President of the Legislative Council.

Approved—December 17, 1817,

NINIAN EDWARDS.

AN ACT to incorporate the Little Wabash Navigation Company.

WHEREAS, it is represented to this General Assembly that the opening of the navigation of the Little Wabash river will be of great public utility, and that there are many persons willing to subscribe considerable sums of money to effect so laudible and beneficial a work, and it being just and proper, that they, their heirs and assigns should be empowered to receive by way of toll, satisfaction for the money advanced by them in carrying the work into execution.

Be it therefore enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That James Ratliff, James Gray, James S. Graham, Daniel Hay, William M'Henry, Leonard White, Seth Gard, Joseph Pomeroy and C. Slocumb, are hereby authorized to open books and receive subscriptions in such places, as they may deem proper; which subscriptions shall be made personally, or by power of attorney. The said books shall be opened on the first day of March next, for receiving subscribers, and may continue open until two thousand shares are subscribed for; but the aforesaid persons, or a majority of them, may at any time after four hundred shares are subscribed for, call a general meeting of the share-holders, by publicly advertising the same, at such time and place as they or a majority of them shall fix on.

SEC. 2. And be it further enacted, That the said subscribers and their heirs and assigns from the time of the said first meeting, shall be and are hereby declared to be incorporated into a company by the name and style of the "Wabash Navigation Company," and may sue and be sued as such: Such of the subscribers as may be present at the said meeting, or a majority of them, are hereby empowered to elect seven directors, who are hereby authorized to elect from among themselves a President; which said President and Directors, shall have the conducting and managing the business of the company, for twelve months, then next after such election; and in case of the death, removal or resignation, or incapacity of the president, or any of the directors, the remaining ones, may call a general meeting of the share-holders to fill such vacancy by elections as aforesaid.

SEC. 3. Be it further enacted, That from time to time, upon the expiration of the said term for which said president and directors were elected, the proprietors of said company may at their next general meeting, which shall be held annually, either continue the

same directors, who may continue the same president, or either of them or elect new ones in their stead.

SEC. 4. After the first meeting as aforesaid, the attendance of proprietors in person, or by proxy, having one hundred shares at the least shall be necessary to constitute a general meeting, but if a sufficient number of share-holders to constitute a general meeting should not attend, those who do meet may adjourn the meeting from day to day, until a sufficient number can be had.

SEC. 5. Each of the shares aforesaid shall be five dollars, payable in five equal instalments, one fifth at the time of subscribing, and the balance from time to time, as the president and directors may require, always giving one months notice in some newspaper, printed in the territory, that such instalment is due and called for, which shall be paid in gold or silver, or the notes of the United States' bank, treasury notes, or the notes of banks who do pay specie, and are current in this territory.

SEC. 6. Be it further enacted, that the said president and directors by and with the advice and consent of a majority of the share-holders shall have power to increase the number of shares to any number not exceeding ten thousand, when it shall be expedient to do so; and it shall be the duty of the said president and directors when they shall increase the number of shares as aforesaid, to give public notice thereof in some public newspaper, printed in this territory.

SEC. 7. The shares in the said company shall be transferable, under such regulations as shall be provided, by the bye-laws and ordinances of the said corporation.

SEC. 8. It shall and may be lawful for the president and directors, or a majority of them, to agree with the owners of any land through which any canal is intended to pass, for the purchase thereof; and in case of disagreement, or in case the owner thereof shall be a feme covert, under age, non compos, or out of the state, on application to any two justices of the peace, in the county in which such land shall lie, the said justices shall issue their warrant under their hands to the sheriff of their county, to summons a jury of twenty four inhabitants of his county, of probity and reputation, not related to the parties, nor in anywise interested, to meet on the land to be valued at a day to be expressed in the warrant, not less than ten nor more than twenty thereafter; and the sheriff upon receiving such warrant, shall forth-

with summons the said jury, and when met, shall administer an oath, or affirmation, to every juryman that shall appear that he will faithfully and impartially value the land, not exceeding in any case one hundred feet in width, and all damages the owner thereof may sustain, by cutting the canal through his, or her land, according to the best of his skill and judgment, and that in such valuation, he will not spare any person for favor or affection, nor any person grieve, for hatred malice or ill-will, and the inquisition thereupon taken shall be signed by the sheriff, and some twelve or more of the jury, and returned by the sheriff to the clerk of the county, to be by him recorded: in every such valuation, the jury are hereby directed to describe any ascertain the bounds of the land by them valued and their valuation shall be conclusive on all persons, and shall be paid by such president and directors to the owner of the land or his legal representatives, and on payment thereof, the said company be seized in fee of such land, as if conveyed by the owner to them, and their successors by legal conveyance: *Provided nevertheless*, that if any future damage shall arise to any proprietor of land in consequence of opening said canal, or erecting such works than had been before considered and valued, it shall and may be lawful for such proprietor as often as any such new damage shall happen, to apply to the justice as before recited, and receive and recover the same as aforesaid, but nothing herein contained shall be taken or construed to entitle the proprietor of any such land, to recover compensation for any damage which may happen to any mills, forges, or other works of improvement, as shall be begun by such proprietor after such first valuation, unless the same damage is wilfully and maliciously done by the said president and directors, or some person by their authority.

SEC. 9. And be it further enacted, That the president and directors, or a majority of them, are hereby authorized to agree with the proprietor for the purchase of any quantity of land, not exceeding one fourth of an acre, at or near the place of receiving toll, for the purpose of erecting buildings, and in case of disagreement, or any of the causes before mentioned, then such land may be valued, condemned and paid for as aforesaid, for the purpose aforesaid; and the said company shall upon payment of the valuation of said land, be seized thereof in fee simple, as aforesaid: And whereas, some of the places through which it may be necessary to conduct some canal, or erect other works may be convenient, for erecting mills, or other water

works, and the persons possessed of the same, may design to improve them, and it is the intention of this act, not to interfere with private property, but for the purpose of improving the navigation :

Be it therefore enacted, That the water, or any part thereof, conveyed through any canal, cut or made by the said company, shall not be used for any purpose, but navigation.

SEC. 10. And be it further enacted, That in consideration of the expenses that said proprietors shall be at in opening the said river, and improving and extending the navigation thereof, and in keeping the works in repair, and the said works and canals with all their profits, shall be and the same are hereby vested in the said proprietors, their heirs and assigns for the term of thirty years, as tenants in common, in proportion to their respective shares, and the same shall be real estate, and be forever exempt from paying any tax, imposition, or assessment whatever, and that it shall and may be lawful for the said president and directors at all times hereafter, subject to the future regulations of the Legislature as to the rate of toll, to have, receive, and demand, at such place on the said canal, as they shall hereafter judge most convenient, for all boats or vessels of any description, the following rates, to-wit :

| | |
|--|---------|
| For each boat not more than 30 feet long and 14 feet wide, | \$ 2 50 |
| For each boat not more than 45 feet long and 14 feet wide, | 3 50 |
| For each boat not more than 60 feet long and 14 feet wide, | 5 00 |
| For every foot over 60 feet long | 01 |
| For every skiff, perouge, or canoe, not more than 2 tons burthen, nor less than one ton | 1 00 |
| For each hundred pipe or hogshead staves, floated or rafted | 01 |
| For each hundred feet of plank, floated or rafted | 01 |
| For each hundred cubic feet of other timber floated | 10 |

Provided, however, That no boat, perogue, or canoe loaded with coal, lime, iron or other ore, or household furniture, shall pay more than one half of the aforesaid prices, and that the said rates, under the limitations aforesaid, shall be collected at such places, and in such manner as the president and directors, or a majority of them, may from time to time determine; and that the said toll be rated and paid in the same kind of money, which subscribers are heretofore compelled to pay in.

SEC. 11. That in case the said company shall not begin the said work in three years after the passage of this act, that then the said

company shall not be entitled to any benefits arising therefrom, and in case they shall not complete said navigation as high up as the base line, in five years for boats or vessels drawing two feet eight inches water, then shall all exclusive interest of the said company cease, as to the navigation and toll, at, to or through any part of the little Wabash river: and whereas weirs, may be erected on said canals when cut, and trees may be fallen in and across the same, and other obstructions therein to the great injury of the said navigation.

SEC. 12. Be it further enacted, That all weirs hereafter to be made on said canals, or any part thereof, or trees fallen in, across, or put in so as to stop up the passage of any vessel, raft or timber, shall be declared nuisances, and the same be removed or destroyed as such by the president and directors, or any person for them. Any person putting any such obstruction in the aforesaid canals, or any part thereof, shall forfeit and pay ten dollars for every such offence, to be recovered before any justice of the peace, in the name, and on behalf of the Wabash navigation company, and to their use and benefit.

SEC. 13. The said canals and the works erected thereupon in virtue of this act, when completed shall forever thereafter be esteemed and taken as a public highway, free for the transportation of all goods, commodities, or produce whatever, upon payment of the toll imposed by this act: *Provided, however*, at the expiration of thirty years it shall be the property of the state or territory, and shall be subject to such rules and regulations as the legislature thereof may make and enter into; and all the right, title and interest of said company shall cease and be at an end, and shall be fully vested in the state or territory as aforesaid.

SEC. 14. At every general meeting the president and directors shall make report and render a strict and just account of all their proceedings, and all such other information as they may think necessary; and such a dividend of the profits shall be made, as the president and directors may think advisable.

SEC. 15. When any thing is due to any person or persons from said company, and the same shall remain unpaid for thirty days, it shall be lawful for any court in the county having jurisdiction of like sums, to give judgment on motion for the amount of the sum due against the president and directors of the said company, with interest from the end of the said thirty days, to the time of payment, and costs: *Provided always*, that ten days notice in writing that such

motion would be made, shall have been left at the office of said company, and the like remedy shall be had against the president and directors, upon every undertaking they shall make, whether by bond, bill obligatory, or note in writing, given by said president and directors, on behalf of the said navigation company, shall be assignable by endorsement thereon, and such of the notes as are payable to bearer, shall be negotiable and assignable by delivery only.

SEC. 16. And the same summary remedy is hereby given against all persons who shall or may be bound by bond, bill obligatory, or note in writing, or assignment of the same to the president and directors of the Wabash navigation company: *Provided always*, that ten days notice shall be given as above, if to be found, if not, a copy thereof shall be left with some person over the age of twenty-one, at his or her place of abode.

SEC. 17. On all motions, judgment shall be given at the first court, unless for good cause shown, the court may continue it to the second term, beyond which it shall on no account be continued; and when the defendant requires it, a jury shall be summoned instanter, to enquire into any question of fact which either party shall state under the direction of the court, and which is not agreed to, and upon the finding of such facts, or the agreement to them, the court shall give judgment according to the right of the case, without regard to form, and without pleading in writing.

SEC. 18. The said corporation shall not deal in any goods, wares or merchandize, or any commodities whatever, except what real estate may be absolutely necessary to carry on their business; and such materials as may be necessary for the promotion and furthering the navigation of the little Wabash river, and building such houses as they may find it necessary to have; and also, the aforesaid kind of money before mentioned, and bills of exchange.

SEC. 19. The president and directors shall have power to pass bye laws, rules and regulations for the good government of the affairs of said company, which shall not be contrary to the laws of the United States, nor of this territory.

WILLIS HARGRAVE,

Speaker pro. tem. of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—December 24, 1817.

NINIAN EDWARDS.

AN ACT *forming a separate County out of Gallatin, White and the detached part of Jackson county.*

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That all that tract of country within the following boundaries, to-wit: Beginning at the corner of townships ten and eleven on the line, between ranges four and five; thence north with said line thirty-six miles; thence west twenty four miles to the third principal meridian; thence south with the same to the line dividing townships ten and eleven; thence east to the beginning, shall constitute a separate county, to be called Franklin: And for the purpose of fixing the permanent seat of justice for said county, the following persons be appointed commissioners: Samuel Hay, Samuel Omelveny and Richard Maulding, which said commissioners, or a majority of them, being duly sworn before some judge or justice of the peace in this territory, to faithfully take into view the situation of the settlements with an eye to future population, and convenience and advantage of the people, and the eligibility of the place, shall meet on the third Monday of February next, at the house of Moses Garrett, in said county, and proceed to examine and determine on the place for the permanent seat of justice, and designate the same: *Provided*, the proprietor or proprietors of the land shall give to the county, for the purpose of erecting public buildings a quantity of land at the said place, not less than twenty acres, to be laid out in lots and sold for the above purpose; but should the said proprietor or proprietors refuse or neglect to make the donation aforesaid, then and in that case, it shall be the duty of the commissioners to fix on some other place for the seat of justice, as convenient and advantageous as may be to the inhabitants of said county; which place fixed and determined upon, the said commissioners shall certify under their hands and seals, and return the same to the next county court in the county aforesaid; which said court shall cause an entry thereof to be made on their books of record; and until the public buildings may be erected, the courts shall be holden at the house of Moses Garrett, in the county aforesaid.

SEC. 2. Be it further enacted by the authority aforesaid, That the commissioners aforesaid, shall receive a compensation of two dollars each for every day that they may necessarily be employed in

fixing the aforesaid seat of justice; to be paid out of the county levy by an order of the county court.

SEC. 3. Be it further enacted by the authority aforesaid, That whereas the counties of Gallatin, Edwards, White, Crawford and Franklin compose one district, for the purpose of electing a member of the Legislative Council, the citizens of said county entitled to vote, may at any election for a member of the legislative council to represent said district, proceed to vote for such member; and it shall moreover be the duty of the sheriff of said county, within ten days after the close of said election to attend at the court-house of the county of Gallatin, with a statement of the votes given in said county, to compare the polls of the respective counties, and join with the sheriffs of Gallatin, Edwards, Crawford and White counties, in making out and delivering to the person duly elected a certificate thereof; and for a failure thereof, he shall forfeit and pay the same penalties, and for the same purposes, that the sheriffs of Gallatin, Edwards, Crawford and White are subject.

SEC. 4. Be it further enacted by the authority aforesaid, That the citizens of the said Franklin county, are hereby declared entitled in all respects to the same right and privilege in the election of a delegate to congress, that are allowed by law to the other counties in this territory: And all elections are to be held at the same times and conducted in the same manner as is provided for other counties.

SEC. 5. And it is further enacted, That the counties of Franklin and Jackson, shall vote for one representative to the house of representatives, at their respective seats of justice, at the time prescribed for holding such elections; and the sheriffs of said counties shall meet at the court-house of Jackson county, within twenty days after any such election, and make out a certificate, signed by both of said sheriffs, to the person duly elected; and if the said sheriffs shall fail to do the same, they shall forfeit and pay the sum of one hundred dollars, for the use of said counties, recoverable by indictment, in the county in which such delinquent sheriff may reside.

This act to take effect and be in force from and after the passage thereof.

GEORGE FISHER,

Speaker of the House of Representatives.

PIRRE MENARD,

President of the Legislative Council.

Approved—January 2, 1818.

NINIAN EDWARDS.

AN ACT *to amend an act entitled, an act regulating Grist Mills
and Millers.*

Be it enacted by the Legislative Council and House of Representatives, and it is hereby enacted by the authority of the same, That each and every miller, or the owner or owners, or occupiers of every water grist mill now erected, or which shall hereafter be built or erected within this territory, shall be entitled to have and receive out of the grain which may be ground in his, her or their said mills: the following rate of toll in full compensation therefor, to-wit: For grinding and bolting wheat or rye into flour, one eighth part thereof; for grinding indian corn, oats, barley or buck wheat, one sixth part thereof; for grinding malt and chopping rye, one eighth part thereof: any thing in the said law to which this is an amendment, to the contrary notwithstanding.

SEC. 2. And be it further enacted, That the second section of the above recited act be, and the same is hereby repealed.

This act to take effect and be in force from and after its passage.

WILLIAM H. BRADSBY,

Speaker pro tempore, of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—December 17, 1817,

NINIAN EDWARDS.

AN ACT *adding a part of Pope county to Johnson, and forming a
new county out of Johnson county.*

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That the boundary lines of Johnson county, shall hereafter be as follows, to-wit: Beginning on the range line, between ranges four and five, east of the third principal meridian, at the corner between townships ten and eleven, south of the base line; thence south along the said range line to the Ohio river; thence down along the Ohio river, to where the range line between ranges one and two east intersects the said river; thence north along the said range line to the corner of townships ten and eleven south; thence east along the township line, between townships ten and eleven, south to the beginning. And that all that part of Pope

county, which is included within the said-boundary, shall hereafter be attached to and form a part of Johnson county.

SEC. 2. And be it further enacted, That all that tract of country lying within the following boundary, to-wit: beginning on the range line between ranges one and two, east at the corner of townships ten and eleven south; thence south along the said range line, eighteen miles, to the corner of townships thirteen and fourteen south; thence west along the township line, between townships thirteen and fourteen south, to the Mississippi river; then up the Mississippi river to the mouth of Big Muddy river; thence up Big Muddy river to where the township line between townships ten and eleven south, crosses the same; thence east along the said township line to the beginning, shall constitute a separate county, to be called "Union" County. *Provided however*, that all that tract of country lying south of township thirteen south, to the Ohio and Mississippi rivers, and west of the range line between ranges one and two east, shall until the same be formed into a separate county be attached to and be a part of Union county.

SEC. 3. And be it further enacted, That the courts directed to be holden in Johnson county, shall be held at the present court-house until a permanent seat of justice shall be established, and a court-house be erected, as hereafter directed: and that the courts directed to be holden in Union county shall be held at the house of Jacob Hunsaker jr. until a permanent seat of justice shall be established, and a court-house erected thereat, as hereinafter directed.

SEC. 4. And be it further enacted, That for the purpose of fixing the permanent seat of justice in Johnson county, William M'Fatrige, James Bane and Isaac D. Wilcox, are appointed commissioners to meet, or a majority of them, at the house of James Bane, for the purpose of fixing the permanent seat of justice in Union county: George Wolf, Jesse Echols and Thomas Cox, are appointed commissioners to meet at the house of John Grammer, on the first Monday in February next, or on such day as they may appoint within thirty days thereafter, and after taking an oath before some judge or justice of the peace, in this territory, to faithfully and impartially take into view the geography of the county, the convenience of the people, and the eligibility of the place, as near the centre of the county as may be, they shall respectively proceed to examine and determine on the place in each county for the permanent seat of justice in the said counties,

and respectively designate the same: *Provided*, that the proprietor or proprietors of the land shall give to the county, at least twenty acres of land, for the purpose of being laid out into lots and sold, or so much thereof as the county court may direct, to be applied to defray the expenses of public buildings thereon for the use of the county. But in case the proprietor or proprietors of the land, refuse or neglect in either county, to make the donation of land as aforesaid, it shall then be the duty of the commissioners aforesaid for that county, to fix on some other place for the seat of justice, as convenient and eligible to the centre of said county as may be, where the proprietor or proprietors of the land will make the donation of land as aforesaid, which place when fixed and determined on, the said commissioners, or a majority of them, in and for each county shall certify under their hands and seals and return the same with a conveyance from the proprietor or proprietors of the land, to the judges of the county court for the use of the county, to the next county court of their county, who shall cause an entry thereof to be made on their records; and the county court in each of the said counties, shall allow to each of the said commissioners two dollars per day for each day's necessary attendance, in fixing the place for the permanent seat of justice.

SEC. 5. And be it further enacted, That the citizens of Union county are hereby declared to be entitled in all respects to the same rights and privileges as are allowed in general, with other counties of this territory, and in the election of a delegate to congress, and members of the house of representatives, when said county shall be entitled to a member or members of the house of representatives by law.

This act to take effect and be in force from and after the passage thereof.

WILLIS HARGRAVE,

Speaker pro. tem. of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—January 2, 1818.

NINIAN EDWARDS.

*AN ACT for the permanent establishment of the seat of Justice
for Crawford County.*

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the

authority of the same, That Seth Gard, Peter Keace and John Waggoner, of Edwards county, are hereby appointed commissioners for the purpose of permanently establishing the seat of justice for the said county of Crawford; they or a majority of them, shall meet at the house of Edward N. Cullum, in said county, between the first and second Mondays in the month of February next, and being duly sworn before some judge or justice of the peace of this territory, faithfully to take into view the situation of the settlements, geography of the county, and the convenience and eligibility of the place; and shall then and there proceed to establish a permanent seat of justice for the said county of Crawford, and designate the same: *Provided, however,* that the proprietor or proprietors owning such land on which the seat of justice may be fixed, shall give to the said county of Crawford, for the purpose of erecting public buildings, a quantity of land on which the said commissioners may fix upon for the seat of justice, not less than twenty acres, to be laid out into lots and sold for the use of the county; but should the proprietor or proprietors refuse or neglect to make the donation aforesaid, then and in that case, it shall be the duty of the said commissioners, to fix upon some other place for the seat of justice, as convenient as may be to the different settlements in the said county; which place when fixed on, and determined by the said commissioners, they shall certify under their hands and seals and return the same to the next county court of the said county of Crawford. And the said commissioners shall be allowed for their services two dollars for every day they may be necessarily employed in fixing upon the aforesaid seat of justice, to be paid out of the county levy; and the said county court, so soon as the said commissioners shall make their return, shall cause an entry of their proceedings to be spread on the records of the said court.

SEC. 2 Be it further enacted, That the county court, shall at the term they receive the said commissioners report, proceed to appoint an agent, whose duty it shall be to lay out the land which may be designated, and given to the said county into lots, and proceed to sell the same by the first day of June next; and that the person so appointed as agent as aforesaid, shall within ten days after the sale of said lots, return to the clerk of the said county court, a correct statement of the sale of said lots, together with all monies he may have received from the sale of said public ground; and the said county court at their next term, on receiving the return as aforesaid,

shall proceed to erect the necessary public buildings for said county; and make such allowances to their agent as they may think just.

SEC. 3. Be it further enacted, That in order to remove all anxiety and quiet the public mind respecting the future division of Crawford county, it is hereby enacted that a line, beginning on the Wabash river and running due west, between townships nine and ten, north of range eleven west, shall be the line between the county of Crawford, and a county which may be laid off north of the same: *Provided, however,* that all that part of Crawford lying north of the line last mentioned, shall remain attached to and be considered a part of Crawford county, until a new county shall be laid out north of the line as above stated.

SEC. 4. Be it further enacted, That all that part of Crawford county, lying north of a west line between nine and ten, shall compose an election district or precinct, in which all elections for members of the legislature, and delegate to congress, shall be held; and it shall be the duty of the commissioners to fix on the seat of justice for Crawford county, as soon after they shall have fixed upon a place for that purpose as may be, to proceed to fix on the most convenient place for holding said elections; and it shall be the duty of the county court, at the term preceeding the several elections held in that district, to appoint three fit persons, who shall be judges of the election, and some fit person to keep the poll thereof: and it shall be duty of the poll-keeper, to send a copy thereof to the sheriff of Crawford county, within three days after the election, who shall attach the same to his poll for the county of Crawford, and after adding the votes together, to proceed as in other cases.

SEC. 5. Be it further enacted, That it shall be duty of the said judges of the election for said district, to take an oath before some justice of the peace of said county, faithfully and impartially to conduct the same.

This act to take effect and be in force from and after the passage thereof.

WILLIS HARGRAVE,

Speaker pro tempore, of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—December 24, 1817,

NINIAN EDWARDS.

AN ACT *to repeal an act entitled, an act to amend an act entitled, an act to amend an act entitled, an act for levying and collecting a tax on land, passed the 24th day of December, 1814.*

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That the above recited act be, and the same is hereby repealed.

SEC. 2. And be it further enacted, That it shall be the duty of the Auditor of public accounts, to contract with the Registers of the Land Offices at Kaskaskia, Shawnoetown, Edwardsville and Vincennes, for abstracts of all lands within this territory, entered in their respective offices by non-residents, which have not heretofore been obtained from them, and lay their respective accounts before the legislature at their next session.

This act to take effect from and after the passage thereof.

GEORGE FISHER,

Speaker of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—December 27, 1817,

NINIAN EDWARDS.

AN ACT *to incorporate Medical Societies for the purpose of regulating the practice of Physic and Surgery in this territory.*

WHEREAS, well regulated medical societies have been found to contribute to the diffusion of true science, and particularly the knowledge of the healing art; therefore,

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, that this Territory be, and is hereby divided into two medical districts, and shall be called the eastern and western districts: the eastern district shall be composed of that part of the territory lying east of the meridian line running due north from the mouth of the Ohio; and the western district of that part lying west of said line.

SEC. 2. Be it further enacted, That it shall and may be lawful for the following persons: J. D. Woolverton, J. E. Throgmorton, Thomas Shannon, Henry Oldham, James Wilson, John Reid, Amos

Chipp, Samuel R. Campbell, Harden M. Wetherford, in the eastern district; and Joseph Bowers, Doctor Todd of Edwardsville, Doctor Hancock of St. Clair, Caldwell Carnes, George Fisher, William L. Reynolds, Doctor Heath of St. Clair, George Cadwell and Doctor Paine, of Kaskaskia, to meet together on the first Monday of May, in the year of our Lord eighteen hundred and eighteen, at the towns of Carmi and Kaskaskia, in their respective districts; and being so convened as aforesaid, or any of them, being not less than five in number, shall proceed to the choice of a president, vice president, secretary and treasurer, who shall hold their offices for one year, and until others shall be chosen in their places; and whenever the said societies shall be organized as aforesaid, they are hereby declared to be bodies politic and corporate, in fact and in name, by the names of the "Medical Society of the district," where such society shall be respectively formed; and by that name shall in law be capable of suing and be sued, pleading and being impleaded, and answering and being answered unto, defending and being defended, in all courts and places, and in all matters and causes whatsoever, and shall and may have a common seal, and may alter and renew the same at pleasure; and the said medical societies shall and may agree upon the times and places of their next meeting, which shall thereafter be the anniversary day of holding their respective meetings.

SEC. 3. Be it further enacted, That the Medical Societies established as aforesaid, are hereby respectively empowered to examine all students who shall or may present themselves for that purpose, and give diplomas, under the hand of the president and seal of such society, before whom such student shall be examined; which diploma shall be sufficient to empower the person so obtaining the same, to practice physic or surgery, or both, as shall be set forth in the said diploma, in any part of the territory. And the person receiving such diploma, shall upon the receipt of the same, pay to the president of said society, the sum of ten dollars, for the use of said society.

SEC. 4. Be it further enacted, That it may be lawful for the medical societies established as aforesaid, at their annual meetings, to appoint not less than three nor more than five censors to continue in office one year, and until others are chosen; and it shall be the duty of each one of them, carefully and impartially to examine all students who shall present themselves for that purpose before each of them, and report their opinions respectively in writing to the

president of said society; and upon such report of any one of said censors, if favorable, the president is hereby authorized to licence such student to practice physic or surgery, or both, until the next annual meeting of the medical society; and for such licence, such student shall pay one dollar to the president for the use of the society.

SEC. 5. Be it further enacted, That from and after the organization of the said medical societies in the respective districts, no person shall commence the practice of physic or surgery in either of the aforesaid districts, until he shall have passed an examination and received a diploma or licence as aforesaid; and if any person shall so practice without having obtained a diploma or licence for that purpose, he shall forever thereafter be disqualified from collecting any debt or debts incurred by such practice, in any court, or before any magistrate in the territory.

SEC. 6. Be it further enacted, That it shall and may be lawful for the medical societies which shall be established by virtue of this act, to purchase and hold any estate real and personal, for the use of the societies respectively: *Provided*, such estate as well real as personal, which the said societies are hereby respectively authorised to hold, shall not exceed the sum of twenty thousand dollars.

SEC. 7. Be it further enacted, That it shall be lawful for the respective societies to be established by this act, to make such bye-laws, rules and regulations, relative to the affairs, concerns and property of said societies relative to the admission and expulsion of members; relative to such donations and contributions, as they, or a majority of the members at their annual meetings shall think fit and proper: *Provided*, the bye-laws, rules and regulations be not contrary to, nor inconsistent with the ordinance, and laws in force in this territory; nor the constitution and laws of the United States.

SEC. 8. Be it further enacted, That the treasurer of each society established as aforesaid, shall receive and be accountable for all monies that shall come into his hands, by virtue of any of the bye-laws of such society; and also for all monies that shall come into the hands of the president, for the admission of members or licensing students; which monies the said president is hereby required to pay over to the said treasurer, who shall account therefor to the society at their annual meetings; and no monies shall be drawn from the treasurer unless such sums and for such purposes as shall be agreed upon by a majority of the society at their annual

meetings, and by a warrant for that purpose, signed by the president.

SEC. 9. Be it further enacted, That it shall be the duty of the secretary of each of the medical societies to be established by virtue of this act, to provide a book, in which shall be made an entry of all the resolutions and proceedings, which may be had from time to time; and also the name of each and every member of said society, and the time of his admission; and also the annual report relative to the state of the treasury, and all such other things as a majority of the society shall think proper; to which book any member of the society may at any time have recourse; and the same together with all books, papers, and records, which may be in the hands of the secretary, and be the property of the society, shall be delivered to his successor in office,

SEC. 10. Be it further enacted, That it shall be lawful for each of the medical societies to be established by virtue of this act, to cause to be raised and collected from each member of such society, a sum not exceeding ten dollars, in any one year, for the purpose of procuring a medical library and apparatus, and for the encouragement of useful discoveries in chemistry, botany and such other improvements as the majority of the society shall think proper.

SEC. 11. Be it further enacted, That nothing in this act contained, shall be construed to prevent any person coming from any state, territory or country from practising physic or surgery in this territory; such person being duly authorized to practice by the laws of such state, territory or country, and having a diploma from any such medical society.

SEC. 12. Be it further enacted, That it shall be in the power of the legislature of this territory, and of the legislature of the state, to be formed out of this territory, to alter, modify and repeal this act, whenever they shall deem it necessary or expedient.

SEC. 13. Be it further enacted, That this act shall be, and hereby is declared to be a public act, and to take effect from and after its passage.

GEORGE FISHER,

Speaker of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—December 31, 1817.

NINIAN EDWARDS.

AN ACT to authorise Samuel Rogers to erect a Mill-Dam upon and across the Kaskaskia River.

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That Samuel Rogers be, and he is hereby authorised to build a Mill-Dam across the Kaskaskia river, at the place known by the name of Henderson's ford, in the county of Randolph.

SEC. 2. And be it further enacted, That the said Rogers shall commence said Mill-Dam within three years from the passage of this law.

SEC. 3. And be it further enacted, That the said Rogers shall in nowise obstruct the navigation of said river, by the erection of said dam; and if such obstruction shall be produced by said dam, it shall and may be lawful for any person whose passage is obstructed, or any other person, upon application made to the county court of Randolph county, and ten days previous notice thereof given to said Rogers, or his assigns, or those claiming under him, to obtain an order of said court, to demolish said dam: *Provided, however*, that if the said dam shall thereafter be erected or repaired, so as not to produce such obstruction as aforesaid, it shall and may be lawful for the owner or occupier thereof to re-establish said dam.

This act to be in force from and after the passage thereof:

WILLIS HARGRAVE,
Speaker pro tempore, of the House of Representatives.

PIERRE MENARD,
President of the Legislative Council.

Approved—December 27, 1817,

NINIAN EDWARDS.

AN ACT to establish a Fishery on the Kaskaskia river.

WHEREAS, it is represented to this Legislature that the establishment of a Fishery on the Kaskaskia river, near to the village of Kaskaskia, would be a public benefit:

Be it therefore enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That Ezra Owen, of the county of Randolph, be, and he is hereby authorized to erect a Dam on the falls of the said river, opposite the mouth of nine mile creek, and opposite the land on

which the said Owen now lives, across the Kaskaskia river, not to exceed three feet high, for the purpose of catching fish.

SEC. 2. Be it further enacted, That by the erection of said dam, the said Owen, is in no way to obstruct the passage of fish, or ordinary navigation; or in any way damnify the public utility of said river: *Provided*, that said fish-dam shall not injure any mill that is now, or may hereafter be erected, either on the Kaskaskia river, or any of its tributary waters.

This act to take effect from and after the passage thereof.

WILLIS HARGRAVE,

Speaker pro tem. of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—December 29, 1817,

NINIAN EDWARDS.

AN ACT concerning the manner of working Salt-Petre Caves.

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That if any person shall occupy or work any Salt-petre cave or caves, in this territory, without first securing the same, with a good and sufficient fence, of the height required in other cases by law, so that horses and neat cattle cannot get to the same; every person or persons so offending shall forfeit and pay to the owner of any horse or horses, or neat cattle that shall be killed by drinking the tray lye, a sum double the value of any such horse or horses, or neat cattle, to be recovered before any court having competent jurisdiction to try the same, by an action of debt.

This act shall take effect from and after the first day of June next.

WILLIS HARGRAVE,

Speaker pro tem. of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—December 29, 1817,

NINIAN EDWARDS.

AN ACT to authorise the establishment of an additional Ferry at Shawnoetown.

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That Adolphus F. Hubbard, be, and he is hereby authorised to establish a Ferry on his land, adjoining the town of Shawnoetown, under the same restrictions and conditions as other ferries are laid under by law: *Provided, however*, that no order of court, nor previous application shall be necessary in order to establish said ferry; provided, that the said Adolphus F. Hubbard shall have the ferry in complete operation within three months from the passage hereof.

This act to be in force from and after the passage thereof.

GEORGE FISHER,

Speaker of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—December 29, 1817,

NINIAN EDWARDS.

AN ACT to provide seals for the several Counties in this Territory.

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That the several courts in each county are hereby authorized to procure seals in all cases where seals are required by law, and make appropriations out of the county levy, for defraying the expense of the same.

This act to take effect from and after its passage.

WILLIS HARGRAVE,

Speaker pro tem. of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—December 29, 1817,

NINIAN EDWARDS.

AN ACT defining the duty of Sheriffs in certain cases, and for other purposes.

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the author-

ity of the same, That in all cases where an indictment or presentment shall be found by the grand jury of any county of this territory, at any term of any court where a grand jury may be impanelled, and a *capias*, or *venire facias* is awarded to arrest the defendant, it shall be lawful for the sheriff in all cases, when the offence does not amount to felony, to take bail for his appearance at the term to which the writ is made returnable; which bail shall be bound in a recognizance to the United States, and shall be liable in the manner hereafter pointed out.

SEC. 2. And be it further enacted, That in all cases where the offence charged shall amount to felony, it shall be the duty of the sheriff arresting the defendant to commit him to the jail of the county where the offence was committed: *Provided, however*, that the said defendant may apply to any judge of the general court or circuit court or any two judges of the county court, or court of common pleas of the county in which he may be arrested, who are hereby authorised to admit the said defendant to bail, or commit him to jail, as he or they may think justice requires, or the law of the land will justify.

SEC. 3. And be it further enacted, That all recognizances taken as aforesaid by any sheriff, and all recognizances entered into any court whereby any person or persons are bound to appear in any court at any term of said court, or on any day, or to abide the order of said court, if the said defendant or defendants should make default, whereby his or their recognizance is or are forfeited to the United States; all such forfeitures may be recovered by a *scire facias* issued against said defendant or defendants, for the amount of said recognizance, and be proceeded on according to law.

This act to take effect and be in force from and after the passage thereof.

WILLIS HARGRAVE,

Speaker pro tem. of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—December 29, 1817,

NINIAN EDWARDS.

AN ACT *directing the mode of perpetuating testimony in this territory.*

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That on the petition of any person or persons to one of the judges of the circuit court, or general court, or county court now established, or hereafter to be established in this territory, praying for a dedimus to take the deposition or depositions of any person or persons named therein within this territory, the petition setting forth that the testimony is to perpetuate the remembrance of any fact, matter or thing which may relate to the boundaries of lands, improvements of lands, name or former name of water courses, the name or former name of any portion or disirict of country, or regarding the ancient customs, laws, or usages of the inhabitants of this country, as far as the same may relate to the future settlements of land claims, or touching the pedigree, titles to slaves, or any other matter or thing, necessary to the security of any estate real or personal, or any other personal right, particularly specifying the fact or facts intended to be proved, and supported by the affidavit, or affirmation of the applicant, that the fact or facts stated in his petition he believes to be true, the said judge shall award a dedimus directed to any two justices of the peace, or to any of the clerks of the circuit court, or court of appeals, in the county where such testimony is to be taken, for the purpose of taking such deposition or depositions prayed for in the petition: *Provided, however,* that it shall be the duty of the person or persons praying for a dedimus, for the purpose before mentioned, before proceeding to take the deposition or depositions, to give one month's previous notice, with a copy of the petition annexed, to each and every person that may be known to be interested in the matter, to be the subject of the deposition or depositions, or to his or her, or their attorney, or in case the person be a married woman, the notice to be served on her husband, or if a minor or minors to be served on his, her or their guardian, or if the guardians should be interested, then a guardian to be chosen by the court for that purpose; and the said notice shall contain information of the time and place when the said testimony is to be taken, or in lieu of a written notice, he, she or they shall cause the notice in form as aforesaid, with a copy of the petition addressed to whom it may concern, to be published once a week for one month, which shall be at least two months previous to the day of

taking such deposition, in at least one of the public newspapers, printed in this territory.

SEC. 2. And be it further enacted, That the said justices of the peace, or clerks as aforesaid, shall attend at the time and place appointed, where each and every person who may think himself or herself interested in the deposition about to be taken, may attend by themselves or attorneys, and may examine and cross-examine, such deponent or deponents; and all the questions and answers shall be reduced to writing and enclosed in such deposition; and the said deposition, being reduced to writing in the English, or in the language of the deponent, if the deponent does not understand the English language; and moreover as near as possible in the very words of the witness, and distinctly read over to said witness, and subscribed by such witness; and the said justice of the peace or clerk as aforesaid, shall administer an oath or affirmation to the truth of the deposition so taken, and shall certify the same deposition, and within thirty days thereafter transmit the same to the county court where the land or property is situated or supposed to be situated, that may be effected by the deposition; and the said clerk shall in his ex officio duty as recorder, record the same, and shall certify on the back of the deposition, that the same has been duly recorded, and return it to the person or persons who first prayed for the same; and the justice of the peace and the clerk of the court, shall receive such fees as are allowed to them for similar services.

SEC. 3. And be it further enacted, That a deposition or depositions, taken in manner and form, and certified as in this act before mentioned, or a duly certified copy of the record of any such deposition, may in case of the death of any such deponent, or in case of inability to give testimony, in consequence of his, her or their insanity, or imbecility of mind, or rendered incompetent, by judgment of law, or in case of his, her or their removal, so that their testimony cannot be obtained in the ordinary way, on trial may be used as evidence, in any cause to which it may relate: *Provided*, that nothing in this act contained shall be so construed as to prevent any and all legal exceptions being made and allowed to the reading such deposition or depositions, on any trial or trials at law, or in equity, in which the same may be introduced as evidence.

This act to take effect and be in force from and after its passage thereof.

WILLIS HARGRAVE,
Speaker pro tem. of the House of Representatives.

PIERRE MENARD,
President of the Legislative Council.

Approved—December 29, 1817,

NINIAN EDWARDS.

AN ACT *supplementary to an act entitled, an act subjecting real estate to sale for debt, passed the seventeenth day of September, eighteen hundred and seven.*

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That whenever a judgment shall be rendered against any defendant or defendants, in any court of record in this territory, and he or they do not produce sufficient personal estate to satisfy such judgment, if such defendant or defendants shall either in his or their own name or names, or the name or names of any other person or persons, have purchased any lands from the United States, entered in any of the land offices in this territory, and shall not have paid the whole of the purchase money for said land, it shall and may be lawful for the party or parties obtaining such judgment or judgments, to demand of the clerk of the court in which such judgment or judgments may have been rendered, an execution directed to the sheriff or coroner, as the necessity of the case may require, of the county in which the land lies, authorising such sheriff or coroner, as the case may be, to levy upon said land, and expose the same to sale in the same manner after giving the same notice that is required in case of the sale of any other lands, by virtue of the act to which this is a supplement.

SEC. 2. And be it further enacted, That when any such sale as aforesaid shall be made, it shall be the duty of the sheriff to specify in his notice where the land lies, designating the section or quarter section, the township and range; and also to state the number of instalments that remain unpaid.

SEC. 3. And be it further enacted, That whenever any sheriff shall levy upon any land or lands as the property of any defendant or defendants, which have been entered and purchased in the name

or names of any other person or persons, and the person or persons in whose name or names the same have been entered, shall claim the same, it shall be the duty of said sheriff to return the execution or executions thus levied, to the next circuit court or court of common pleas, to be held in his county, with a list or memorandum of the lands which have been levied upon, stating the name or names of the party or parties claiming the same; and it shall be the duty of the clerk to issue a notice in writing, directed to the sheriff of the county in which the judgment was obtained, requiring to notify the party or parties at whose instance the execution or executions issued, that the land has been claimed, and by whom; and that he must appear at the next succeeding court to which the execution is made returnable, to shew cause why the said lands should not be released from any further claim on the part of the said party or parties, at whose instance the said execution or executions were issued; and it shall be the duty of such sheriff to serve said notice on said party or parties, if he or they may be found in his bailiwick; and if he or they are not to be found, to be served on his or their agent or attorney; and it shall be the duty of said clerk to whom such execution and claim are returned, to enter the case on his docket at the head of the returns to that term of said court.

SEC. 4. And be it further enacted, That it shall be the duty of the court to which they are returned, to order a jury to be summoned as in jury trials, and determine in a summary way the right of property, according to the rules of equity; and if the jury shall decide that the land in dispute is according to equity, the property of the defendant or defendants; against whom such execution or executions issued, the party at whose instance the original execution or executions issued, shall be entitled to sue out a new execution; and after giving the same notice that was at first required, the said land shall be exposed to sale.

SEC. 5. And be it further enacted, That when any such land as aforesaid, shall be sold at sheriff's sale for the satisfaction of execution or executions, the sheriff selling the same, shall give a deed or deeds to the person or persons purchasing the same, mentioning in said deed or deeds, the interest which is thereby conveyed.

SEC. 6. And be it further enacted, That when the sheriff as aforesaid shall levy on land as aforesaid, entered in the name of any other person or persons than his, as whose property it is taken, and such

other person or persons shall claim the same, it shall and may be lawful for the party at whose instance the same has been levied upon, to file his written interrogatories to the party claiming the same, requiring him to state on oath the nature of his or their claim, and whether the land has been in fact entered for their benefit, and to be paid for with their money or not; and it shall be the duty of the party to whom such interrogatories are addressed, to answer the same on oath; and a failure to answer in a reasonable time, shall amount to a relinquishment of claim, and the court shall proceed to enter a judgment in such case against such claimant, for ten per cent. on the amount of said execution, and an order for the sale of said lands, which were originally levied upon.

SEC. 7. And be it further enacted, That the said parties shall have the right of summoning and coercing the attendance of witnesses as in other cases; and the trial of the right of property as aforesaid, shall be conducted as far as relates to continuances as an original action:—*Provided however*, that such trial shall be had at the first term to which the execution is returnable, if neither party shew good cause for a continuance.

This act to be in force from and after the passage thereof.

GEORGE FISHER,

Speaker of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—January 2, 1818,

NINIAN EDWARDS.

AN ACT to divorce Elizabeth A. Sprigg from the banns of matrimony.

WHEREAS, it has been represented to this legislature, that Elizabeth A. Sprigg has been shamefully abandoned by James Sprigg, her husband, and that the said James Sprigg has and does still continue to live in the most shameful incontinency: And whereas, it has been represented to this legislature, that said Elizabeth A. Sprigg must be considerably injured if she cannot obtain a divorce sooner than in the ordinary way: Therefore,

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and is it hereby enacted by the authority of the same, That the banns of matrimony heretofore existing between the said Elizabeth A. Sprigg and James Sprigg her husband,

be, and the same are hereby dissolved; and that the said Elizabeth be, and she is hereby divorced from her said husband.

This act to be in force from and after the passage thereof.

GEORGE FISHER,

Speaker of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—January 6, 1818,

NINIAN EDWARDS.

AN ACT to authorise William Morrison of Kaskaskia, to build a Floating Bridge over the Kaskaskia river, in the county of Washington.

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That William Morrison be authorised and permitted at his own individual expense, to build and establish for the term of seven years, a Floating Bridge over the Kaskaskia river, in the county of Washington, at any eligible point that may be designated by the commissioners appointed to fix and establish the permanent seat of justice for said county: *Provided, nevertheless*, that the place so designated by the commissioners, or a majority of them, shall be at some point, between the mouths of Shoal and Crooked creeks; and it shall be the duty of the said commissioners or a majority of them, within five days after they have fixed and decided upon the permanent seat of justice for said county, to proceed to examine the ground on both sides of the river, between the points before mentioned, and faithfully take into view the situation of the country and eligibility thereof, to obtain the best possible ground for a road from thence to the road leading from Vincennes to St. Louis or Belleville; and having fixed and determined upon the most eligible in their opinion, to promote public convenience, they shall report the same under their hands and seals, to the first county court that may sit in the county, and the court shall record the same: *Provided also*, that the said William Morrison, shall be bound to pay to the said commissioners the sum of two dollars per day each, for the time in which they may necessarily be employed in fixing on said place.

SEC. 2. Be it further enacted, as a compensation for erecting and establishing a Floating Bridge as aforesaid, that the said William Morrison, may charge and receive as toll therefor, the same rates as are

allowed by law, to those that keep Ferries on the said river, for seven years, from and after the completion of the said bridge; but it is provided that the said bridge shall be so constructed as not to injure the navigation of said river.

SEC. 3. Be it further enacted, That the said William Morrison, shall not be interrupted, or be injured by any other persons building a bridge or establishing a ferry, within three miles of his bridge, for the space of seven years.

SEC. 4. Be it further enacted, That if the said William Morrison fails or refuses to enter and purchase the land from the United States, or the proprietor or proprietors, that may own the same, and erect, establish and finish the building of the said bridge within two years, then and in that case, he shall forfeit all claim to the benefit of this act.

This act to take effect and be in force from and after the rising of the legislature.

GEORGE FISHER,
Speaker of the House of Representatives.

PIERRE MENARD,
President of the Legislative Council.

Approved—January 6, 1818,
NINIAN EDWARDS.

AN ACT to establish the line between the counties of St. Clair and Madison.

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That a line beginning on the Mississippi river between townships two and three, north of the base line; thence east along the said township lines, to the eastern boundaries of the said counties, shall be the division line between the said counties of St. Clair and Madison.

This act to take effect from and after its passage.

GEORGE FISHER,
Speaker of the House of Representatives.

PIERRE MENARD,
President of the Legislative Council.

Approved—January 6, 1818.
NINIAN EDWARDS.

AN ACT *declaring Big Muddy River a Navigable stream.*

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That Big Muddy river from the mouth up to the shoal where the road leading from Shawnoetown to Kaskaskia crosses said river, be, and the same is hereby declared navigable: *Provided*, that the said stream may be used for the carrying on any mill, or other water works as heretofore, provided the navigation thereof is not thereby obstructed.

This act to take effect and be in force from and after the passage thereof.

GEORGE FISHER,
Speaker of the House of Representatives.

PIERRE MENARD,
President of the Legislative Council.

Approved—January 6, 1818,

NINIAN EDWARDS.

AN ACT *forming a new County out of the County of St. Clair.*

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That all that district of country within the following bounds and limits to-wit: Commencing at the north west corner of township No. two, north of range No. five west; thence east to the north east of township No. two north on the third principal meridian line; thence south with the said meridian line to the south east corner of township No. three south; thence west to the south west corner of township three south of range five west; thence north between ranges five and six west to the beginning, shall constitute a separate and distinct county, to be called Washington: and the seat of justice for said county shall be the house of James Bankson, until it shall be permanently established, in the following manner, that is to say, there shall be appointed five persons, to-wit: Jacob Turman, Thomas Rattan, Leven Maddux, Reuben Middleton and James Fisher, who, or a majority of them, being duly sworn before some judge or justice of the peace of this territory, faithfully and impartially to take into view the situation of the settlement, the geography of the county, the convenience of the citizens, and the eligibility of the place, shall

meet on the first Monday in March next, and proceed to examine and determine on the place for the permanent seat of justice, and designate the same: *Provided*, that the proprietor or proprietors of the land shall give to the county, for the purpose of erecting public buildings, a quantity of land at said place not less than twenty acres, to be laid off in lots and sold for the above purpose. But should the proprietor or proprietors neglect or refuse to make the said donation as aforesaid, then and in that case, it shall be the duty of the said commissioners to fix and decide upon some other spot or place for the seat of justice; as convenient as may be to the present and future settlements of said county; or should the said commissioners fix it upon lands belonging to the United States, in that case the judges of the said county, or any two of them, may apply to the Register of the land office in which the land lies, and in behalf of the said county, purchase one quarter section, for the use of the county, and the seat of justice shall be established thereon, and the county shall be bound for the purchase money; which place when fixed upon and determined, the said commissioners shall certify under their hands and seals, and return their certificate of the same to the next county court, or court of common pleas, in the county aforesaid: and as a compensation for their services, they shall be allowed two dollars for every day they may be necessarily employed in fixing the aforesaid seat of justice, to be paid out of the county levy; which said court shall cause an entry thereof to be made upon their records.

SEC. 2. Be it further enacted, That the citizens of St. Clair and Washington counties that are entitled to vote, may at any election for a member of the legislative council, and members to the house of representatives to represent said district, proceed to vote at their respective seats of justice for such member; and it shall moreover be the duty of the sheriff of the said county of Washington, within ten days after the close of said election, to attend at the court-house of the county of St. Clair, with a statement of the votes given in the said county of Washington, to compare the polls of the respective counties; and it shall be the duty of the sheriffs of St. Clair and Washington, to attend at such time and place, with a statement of the votes of St. Clair and Washington counties; and upon counting the votes of the said counties, it shall be the duty of the sheriffs of St. Clair and Washington to make out and deliver to the persons duly elected a certificate thereof. If the said sheriffs or either of them,

shall refuse or fail to perform the duty required of them by this section, such delinquent shall forfeit and pay the sum of two hundred dollars to be recovered by action of debt, or indictment in any court having jurisdiction, one half to the use of the territory, the other half to the use of the person suing for the same.

SEC. 3. Be it further enacted, That the citizens of Washington county are hereby declared to be entitled in all respects to the same rights and privileges in the election of a delegate to congress of this territory, as are allowed to other counties; and all elections are to be conducted at the same time, and in the same manner as provided for other counties in this territory.

This act to take effect and be in force from and after its passage thereof.

WILLIS HARGRAVE,

Speaker pro tem. of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—January 2, 1818,

NINIAN EDWARDS.

AN ACT *supplemental to an act entitled, an act supplementary to the several laws for levying and collecting a tax on Land.*

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That it shall be the duty of the several sheriffs to pay over to the territorial Treasurer, the amount of the tax on land collected by them respectively, in current bank notes, or gold and silver coin, or audited paper of the territory; and if any such sheriff shall fail or neglect to pay over to the said Treasurer the whole amount of taxes on land which he may have collected, or which by law he ought to have collected, on or before the tenth day of December, yearly and every year, every such sheriff for such failure or neglect shall forfeit and pay one per centum on all such amount for each and every day thereafter until the same shall be paid; and it is hereby made the duty of said Treasurer to charge every such sheriff with the per centum aforesaid, and to exact the same upon settlement: *Provided, however,* that nothing in this act contained shall be so construed as to prevent the auditor of public accounts from giving the several sheriffs

aforesaid, credit for the delinquencies, or for lands he, or they could not sell according to law.

This act to take effect and be in force from and after the first day of June next.

GEORGE FISHER,

Speaker of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—January 6, 1818,

NINIAN EDWARDS.

AN ACT *providing for taking the census of the inhabitants of the Illinois territory, and for other purposes.*

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That there shall be appointed by the Governor, some fit person in each county within this territory, whose duty it shall be to take a list of all citizens, of all ages, sexes and colour, within their respective counties, particularly noting whether white or black, and also noting particularly free male inhabitants above the age of twenty-one years.

SEC. 2. Be it further enacted, That each commissioner before he enters on the duties of his office, shall take and subscribe, before some justice of the peace, or judge of the county court, the following oath, or affirmation, viz: "I, A B, of the county of—— do solemnly swear, or affirm as the case may be, that I will well and truly make a just and perfect enumeration of all persons residents within the county of—— to the best of my ability, and return the same to the Secretary of the territory according to law."

SEC. 3. Be it further enacted, That the said commissioners so appointed, shall commence on the first day of April, and shall finish and make return to the secretary's office on or before the first day of June next; and it shall be the duty of said commissioners to make the said enumeration, by actual enquiry at the dwelling house, or of the head of every family in their respective counties, and not otherwise.

SEC. 4. Be it further enacted, That the said commissioners shall each receive as a full compensation for the above services, and for services hereinafter mentioned the following sums to-wit: the commissioner for the county of Bond, \$40; St. Clair, \$70; Madison, \$70;

Washington, \$45; Monroe, \$45; Randolph, \$60; Jackson, \$40; Johnson, \$70; Union, \$70; Gallatin, \$70; White, \$70; Edwards, \$70; Crawford, \$80; Franklin, \$40; Pope, \$40; to be paid out of their respective county treasuries.

SEC. 5. Be it further enacted, That the said commissioners shall observe the following form in taking the enumeration, viz.

Names of heads of families,
Free white males, twenty-one years and upwards,
All other white inhabitants,
Free people of colour,
Servants or slaves.

SEC. 6. Be it further enacted, That every person whose usual place of abode shall be in any family on the aforesaid first day of April, shall be returned as of such family.

SEC. 7. Be it further enacted, That each and every free person more than sixteen years of age, whether heads of families or not, belonging to any family within any of the counties in this territory, shall be and are hereby required to render to the said commissioners, if required, a true account, to the best of his or her knowledge, of all and every person belonging to said family respectively, on pain of forfeiting twenty dollars, to be sued for and recovered before any justice of the peace of the county, one half for the person suing for the same, the other half to the territory.

SEC. 8. Be it further enacted, That if any commissioner having been appointed and qualified as such shall fail or refuse to perform the several duties required by this act, he so offending shall forfeit and pay the sum of two hundred dollars, one half to the use of the person suing for the same, and the other half to the use of the territory.

SEC. 9. Be it further enacted, That the commissioners to be appointed by virtue of this act, to take the census, in the several counties in this territory, shall at the same time take in a list of county and territorial taxes, from each and every person subject to taxation; and do and perform all the duties heretofore required of county commissioners, in taking in a list of taxable property, and return a list of said taxable property so taken in, into the clerk's office of their respective counties according to law; any thing in any former law to the contrary notwithstanding.

This act to take effect and be in force from and after the passage thereof.

GEORGE FISHER,

Speaker of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—January 7, 1818,

NINIAN EDWARDS.

AN ACT *supplemental to an act entitled, an act for taking the census of the inhabitants of this territory.*

WHEREAS, it is doubtful whether the prayer of this general assembly to congress, requesting that the citizens of this territory may be permitted to form a state government will be granted, before a census of the inhabitants of this territory shall be taken, and exhibited to that honorable body: And whereas, a great increase of population may be expected between the first day of next June and December following: Therefore,

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That the commissioners to be appointed to take the census of the inhabitants of their respective counties according to the law to which this is a supplement, shall continue to take the census of all persons who may remove into their respective counties between the first day of June and the first day of December next, succeeding; of which additional returns shall be made to the secretary's office, within the first week in December next, and for which additional service, compensation shall be made at the next session of the general assembly: *Provided, however,* that no such additional service shall be performed if congress should authorise the citizens of this territory to form a state government without it; and notice thereof be given by the governor of the territory, in the newspaper printed at the seat of government, by the public printers; which notice it shall be the duty of the governor to give if the fact should exist.

This act to take effect from and after its passage.

GEORGE FISHER,

Speaker of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—January 10, 1818.

NINIAN EDWARDS.

AN ACT *to organize the Militia of Crawford County, and for other purposes.*

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That it shall and may be lawful for the governor of this territory, to constitute and organise such part of the eighth regiment as lies within Crawford county into a separate regiment; the commanding officer of which, shall have the same powers and perform the same duties as other lieutenant colonels.

SEC. 2. Be it further enacted, That it shall and may be lawful for the governor of the territory, to appoint to each brigade in this territory, a brigade inspector, who shall exercise all the power, and perform all the duties required or performed by the adjutant-general, prior to the twenty-sixth day of December, eighteen hundred and twelve.

This act to take effect from and after the passage thereof.

GEORGE FISHER,

Speaker of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—January 5, 1818,

NINIAN EDWARDS.

AN ACT *to incorporate the Town of Kaskaskia.*

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, that the following persons be, and they are hereby appointed trustees of the town of Kaskaskia, to continue in office until the first Monday in May next, and until the election of their successors, as hereinafter provided, to-wit: John M'Ferron, Shadrach Bond, Henry Bienvenue, Antoine Ravel and Elias K. Kane.

SEC. 2. Be it further enacted, that the holders of lots in said town, being residents thereof, or being in possession of any lot or lots, and holding a bond for conveyance, shall be, and they are hereby authorised to elect five trustees annually, on the first Monday in May: That it shall be the duty of the sheriff of Randolph county to give twenty days previous notice in writing, at the door of the court house of said county, that such an election will be holden; and also to super-

intend and conduct the same; and may employ a clerk to assist him in keeping the poll; for which services, compensation shall be made by the trustees.

SEC. 3. Be it further enacted, That the trustees shall have power to appoint a clerk to their board, and to appoint a town constable; it shall be the duty of the clerk to assess and value annually all the lots in said town and make a return thereof to the trustees, having previously taken an oath before some justice of the peace, truly and impartially to perform the same; but in the valuation of the said lots, the houses and other improvements erected thereon, shall not be taken into consideration.

SEC. 4. And be it further enacted, That upon the return of such list of assessment and valuation by the clerk, the trustees shall levy a tax on each owner of a lot or lots, at a rate not exceeding two per centum per annum, on the valuation of said lots, for paying such expenses as have heretofore accrued for surveying the streets, and for paying the expenses of their officers, clearing and keeping in repair the streets and such other improvements as may be deemed expedient and necessary, by the board of trustees.

SEC. 5. And be it further enacted, That it shall be the duty of the clerk annually, after the trustees shall have fixed the rate of taxation, to place the amount on each lot in the list, and deliver the same to the town constable, who shall collect the same from the several persons charged therewith; but before he enters on the duties of his office, he shall give bond and security to the trustees and their successors in office, in double the sum to be collected, conditioned for the faithful collection and accounting for the same according to law; and shall moreover take an oath before some judge or justice of the peace of the county, that he will faithfully and impartially execute the duties of his office to the best of his abilities according to law. The said constable shall by sale of the lots or otherwise, collect and account with the trustees for the amount of the taxes put into his hands for collection, within three months from the time the list shall be put into his hands for collection; and for the collecting of the said taxes, the trustees shall allow the said constable a sum not exceeding ten per cent. on the amount collected. The said constable shall make personal application to the person or persons charged with the tax in the list, if they be residents of the said town, before he shall expose to sale any lot or other property, to make the amount of the tax due,

and if the amount be not paid to the constable within one month after such application, it shall and may be lawful for the constable to seize any personal property of any such delinquent, which he may find in said town; and after having given ten days previous notice in writing at the door of the court house of the county to make sale thereof, or so much as will pay the tax and costs of keeping the property; and in case the constable cannot find any personal property, whereof he can make the taxes due from any person charged with the taxes aforesaid, it shall and may be lawful for the constable to sell the whole, or so much of each lot at public sale, after having given three weeks previous notice in some public newspaper, printed in said town, as will pay the tax due thereon, and the cost of advertising; and shall give the purchaser or purchasers a certificate thereof, which shall vest the title completely in the purchaser, in whose name soever the same shall be sold, unless the same shall be redeemed by the owner, by paying to the purchaser within twelve months after such sale, the amount of the purchase money with one hundred per centum thereon: *Provided however*, that in case there shall be no bidder for any lot or lots thus exposed to sale, the same shall be struck off by the constable in the name of the trustees, for the use of the said town; and the constable shall certify the same accordingly, and the title shall be vested in the trustees in the same manner and under the same restrictions, as if the same had been sold to any other purchaser or purchasers.

SEC. 6. Be it further enacted, That on the death, resignation or removal of any one or more of the trustees, the vacancy shall be filled by the remaining trustees, who shall appoint a successor or successors to continue in office until the next election; and in case there should not be an election held for trustees at the time appointed by this act, the last trustees in office shall continue in office until the next annual election.

SEC. 7. And be it further enacted, That the trustees of said town, or a majority of them, shall have power and authority to make such bye-laws, rules and ordinances, for the good regulation of the said town and the commons attached thereto as shall to them seem meet, if not inconsistent with the laws of this territory, or the ordinance, and cause the same to be published in the most public place in said town, from time to time, for the information of all the citizens thereof. And it shall be the duty of the said trustees to assign some piece of

ground on the commons, near to said town, for a public burying ground. And the said trustees may whenever they shall think proper, on the application of the owner or owners of land adjoining said town, and wishing to lay off the same into town lots, and have the same attached to, and made a part of the said town, to cause a plan thereof, to be connected to the existing plat of the said town, under such conditions as the said trustees may deem necessary, not inconsistent with law; and may require and take such bonds or obligations with security, from such applicant as they may deem requisite.

SEC. 8. And be it further enacted, That it shall be the duty of the said trustees to cause the streets of said town to be cleaned and kept open, and cause the lines thereof to be perpetuated by proper stakes or stones; and cause all ponds and stagnant pools of water to be drained, which may be supposed detrimental to the health of the inhabitants. The said trustees or a majority of them, shall have power to direct all trespassers and persons not having a right, to be removed from the commons, attached to the said town; and may for public use, permit such public buildings to be erected on any unappropriated lot or lots in said town, or the commons attached to the same, as they may deem proper for the benefit of the said town to order and direct. And the board of trustees for said town, shall have power for and in behalf of said town to sue and be sued, plead and be impleaded, in any suit or suits, real, personal, or mixed in any courts in this territory.

SEC. 9. And be it further enacted, That any three of the trustees of said town, shall be sufficient to constitute a board, and they may direct the town constable to execute and observe, such rules and orders, as they shall require to be executed and carried into effect.

This act to take effect and be in force from and after the passage thereof.

GEORGE FISHER,

Speaker of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—January 6, 1818,

NINIAN EDWARDS.

AN ACT *for the relief of Thomas C. Brown, a member of the
Legislative Council*

WHEREAS, Thomas C. Brown, a member of the legislative council was taken sick on his way to the seat of government, to attend the legislature, and did not arrive until part of the session had elapsed :

Be it therefore enacted by the Legislative Council and House of Representatives of the Illinois territory and it is hereby enacted by the authority of the same, That the said Thomas C. Brown, shall receive his per diem compensation from the commencement of the present session of the legislature.

GEORGE FISHER,
Speaker of the House of Representatives.

PIERRE MENARD,
President of the Legislative Council.

Approved—January 10, 1818,

NINIAN EDWARDS.

AN ACT *providing for the collection of the tax of one thousand eight
hundred and seventeen, and for other purposes.*

WHEREAS, it has been represented to this legislature, that in consequence of the change in the mode of taking in taxable property, some counties have not assessed at all, and others have assessed it after the time prescribed by law, the consequence of which is, there has been in several counties no tax collected : For remedy whereof,

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That it shall be lawful for the county court in any county in this territory, where the property has been assessed prior to the passage of this act, to order the sheriff of said county to proceed to collect the same, in the same manner as if it had been assessed agreeable to law.

SEC. 2. And be it further enacted, That it shall be the duty of the county court in any county in this territory, where there has been no assessment, or where the court shall be of opinion that such assessment has only been a partial one, to appoint commissioners in each township, who shall be qualified in the same manner, and perform the same duties, and receive the same emoluments, as specified in the act entitled an act altering the mode of taking in taxable property,

passed the eleventh day of January, eighteen hundred and seventeen.

SEC. 3. Be it further enacted, That the several sheriffs shall proceed to collect the said county and territorial tax, so assessed and put into his or their hands for collection, in the same manner, and under the same rules, regulations and penalties, as near as may be, that are prescribed by the above recited act: *Provided, however*, that all monies which have been collected as tax, by any sheriff of any county, shall be and is declared legal, as if the same had been assessed and collected according to law.

SEC. 4. And be it further enacted, That the several counties from which any portion of either of the counties of Union, Washington and Franklin and Johnson have been taken, shall have the same power of collecting the county levy, or territorial tax, which has been assessed in said counties and remains unpaid, as though those counties had not been erected.

SEC. 5. Be it further enacted, That the said counties from which any portion of those new counties was taken, shall have the power to issue their process into so much of those new counties as originally belonged to them for the purpose of bringing to a final close, all business now pending in said counties.

This act to be in force from and after the passage thereof.

GEORGE FISHER,
Speaker of the House of Representatives.

PIERRE MENARD,
President of the Legislative Council.

Approved—January 9, 1818,
NINIAN EDWARDS.

AN ACT supplemental to an act entitled, *an act for the removal and safe keeping of the ancient records and papers of this territory*, passed the 25th day of December, 1812.

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That the secretary of the territory shall be entitled to the same fees for each and every search of the ancient papers and records of this territory, that were allowed to the recorder of Randolph county, when said papers and records were in his possession.

This act to be in force from and after the passage thereof.

GEORGE FISHER,
Speaker of the House of Representatives.

PIERRE MENARD,
President of the Legislative Council.

Approved—January 8, 1818,

NINIAN EDWARDS.

AN ACT to amend an act entitled, *an act establishing courts for the trial of small causes, passed the seventeenth day of September, eighteen hundred and seven.*

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That so much of the above recited act as requires defendants on stay of execution, when not a freeholder, to give security in the nature of special bail, be, and the same is hereby repealed.

SEC. 2. And be it further enacted, That where judgment shall be given against a person who is not a freeholder in the county where such judgment shall be given or obtained, no stay of execution shall be had, unless such person shall give good and sufficient security to the adverse party, for the payment of the amount of the judgment so obtained, within the times specified in the above recited act.

This act to take effect and be in force from and after the passage thereof.

GEORGE FISHER,
Speaker of the House of Representatives.

PIERRE MENARD,
President of the Legislative Council.

Approved—January 9, 1818,

NINIAN EDWARDS.

AN ACT supplemental to the acts establishing circuit courts, and for the appointment of circuit attorneys.

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That the county of Washington shall hereafter be attached to, and form a part of the first judicial circuit; and the county of Union to the second circuit and the county of Franklin

to the third circuit; and the circuit attornies shall prosecute all pleas on behalf of the territory, originating in said counties.

SEC. 2. Be it further enacted, That the United States' Judges who hold the circuit courts in this territory, shall hold circuit courts in the aforesaid counties of Washington, Union and Franklin, according to the provision of the first section of this act.

SEC. 3. Be it further enacted, That the circuit courts in the counties aforesaid shall be holden at the following times, to-wit: In the county of Washington, on the third Mondays of February, June and October; in the county of Union, on the fourth Mondays of August, April and December; in the county of Franklin, on the fourth Mondays of January, May and September.

SEC. 4. Be it further enacted, That said circuit attornies shall each receive an annual salary of one hundred dollars, to be paid quarterly out of the public or territorial treasury, and shall receive the following fees, viz. for all indictments which are sustained for treason, murder, or felony, the sum of fifteen dollars, and for indictments or presentments, which are sustained by the courts for any offence which is not felony, the sum of five dollars.

SEC. 5. In all cases where the party shall be convicted, the fees aforesaid shall be paid by such convicted party, to be taxed in the bill of costs against such defendent and collected accordingly: *Provided, however,* that where the party convicted shall not be able to pay the fees aforesaid to the said attornies, it shall be paid out of the county treasury.

SEC. 6. And be it further enacted, That all cases where an indictment shall be sustained and the traverse jury shall find the defendant not guilty the prosecuting attorney shall be entitled to the same fees as are allowed for similar prosecutions, and to be paid by the prosecutor.

This act to take effect from and after the passage thereof.

GEORGE FISHER,
Speaker of the House of Representatives.

PIERRE MENARD,
President of the Legislative Council.

Approved—January 9, 1818,
NINIAN EDWARDS.

AN ACT to authorise Joseph Smith to build toll bridges across the Big and Little Beaucoup creeks.

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That Joseph Smith, be, and he is hereby authorised to erect toll bridges across the Big and Little Beaucoup creeks, on the road leading from Kaskaskia to Shawnoetown, and shall enjoy the profits thereof, for twelve years from the passage of this act: *Provided*, the bridges are erected within one year from the passage hereof; and the said Smith shall receive such toll as the county courts may, from time to time allow: provided also, that no toll bridge shall be erected within three miles either above or below the said bridges, within the aforesaid twelve years.

This act to be in force from the passage thereof.

GEORGE FISHER,

Speaker of the House of Representatives,

PIERRE MENARD,

President of the Legislative Council.

Approved—January 10, 1818.

NINIAN EDWARDS.

AN ACT to regulate the representation in certain Counties in the General Assembly

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That the counties of Johnson and Union shall be entitled to one member in the house of representatives; and the qualified voters in said counties may at any election for a member of the legislative council and house of representatives to represent said counties, and the district of which they compose a part, proceed to vote at their respective seats of justice for such members.

SEC. 2. Be it further enacted, That it shall be the duty of the sheriffs of Johnson and Union, ten days after the close of the election, to attend at the seat of Justice for Johnson county with a statement of the votes given in their respective counties, to compare the polls, and upon counting the same, to give to the person duly elected as a member of the house of representatives, a certificate thereof. It shall also be the duty of the said sheriffs, and the sheriff of Pope county to attend at

the same time and place, with a statement of the votes given in their respective counties for a member of the legislative council; and on comparing and counting said votes, to give the person duly elected a certificate thereof.

SEC. 3. Be it further enacted, That the counties of Bond and Washington, shall be entitled to one member in the house of representatives; and that the qualified voters of said counties may vote for the same at their respective seats of justice at the time prescribed by law for such elections in other counties; and it shall be the duty of the sheriffs, or their lawful deputies of said counties, within eight days after the elections, to meet at the place called Hill's ferry, on the Kaskaskia river, with a statement of the polls of their respective counties; and on comparing and counting the same, to give to the person duly elected a certificate thereof: *Provided*, that nothing herein contained shall be construed so as to change the right now secured to the citizens of said counties, of voting for a member of the legislative council, for the respective districts; but the elections for that purpose, shall be as heretofore prescribed.

SEC. 4. Be it further enacted, That the county of St. Clair shall not hereafter be allowed to elect more than one member of the house of representatives.

SEC. 5. Be it further enacted, That the qualified voters of said counties, shall be allowed all the rights and privileges that are secured to the qualified voters of other counties in the election of a delegate to congress.

SEC. 6. All laws repugnant hereto shall be, and the same are hereby repealed.

This act to take effect and be in force from and after its passage thereof.

GEORGE FISHER,

Speaker of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—January 9, 1818,

NINIAN EDWARDS.

AN ACT to incorporate the Stock holders of the Illinois Navigation Company.

WHEREAS, Henry Bechtle, and his associates, citizens of the United States of America, and proprietors of the town of America, in

the county of Johnson, and territory of Illinois, purpose to improve the navigation of the waters near the mouth of the Ohio river, in said territory, by cutting Canals, erecting Locks, and other works as to them shall seem necessary: and whereas, it is proper and advisable to encourage so laudable an undertaking: Therefore,

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That Henry Bechtle, and his associates, for the purpose of cutting canals, erecting locks, and other works as aforesaid, shall be, and hereby are made a corporation, in fact and in deed, by the name of the President and Directors of the Illinois Navigation Company, and by that name they and their successors shall have succession, and shall be persons in law, capable of suing and being sued, pleading and being impleaded, answering and being answered unto, defending and being defended, in all courts and places whatsoever, and they and their successors shall be in law capable of purchasing, holding and conveying any estate, real or personal, for the public use of said corporation, and may have and use a common seal, and the same may break, alter and renew at pleasure; and the president and directors for the time being, or a major part of them, shall have power to make and prescribe such rules and regulations, as to them shall appear useful and proper, touching the management and disposition of the stock, property and estate of the said corporation; and touching the duties and conduct of the officers and agents employed therein; and touching all such matters as appertain to the said corporation, with power to appoint such and so many officers, clerks, agents, servants and workmen, to be employed in and about the business and concerns of the said corporation as they may deem necessary.

SEC. 2. Be it further enacted, That the capital stock of the said corporation shall be divided into ten thousand shares, and each share shall be one hundred dollars; and that each stock-holder shall be entitled to a number of votes for the directors, proportioned to the number of shares which, he, or she shall have or hold in his or her name, each share being entitled to one vote; the shares subscribed shall be paid in current money of the United States, and in such instalments as the president and directors may order.

SEC. 3. Be it further enacted, That so soon as two thousand shares shall have been subscribed, under the direction of the person heretofore named, there shall be held at the town of Shawnoetown, in

said territory, an election for five directors, by the stock-holders entitled to vote as aforesaid, reserving the right to any stock-holder to vote by his authorised agent or attorney; and in case of the death of any such stock-holder the right to vote, shall be exercised by his executor or administrator; and a majority of votes actually given, shall determine such election of directors, who shall choose from among themselves a president, and shall continue in office one year from the time of such election, and until others are chosen; and annually thereafter there shall be an election for directors and president, as aforesaid, at such place in said town of America, as the president and directors shall designate, by public notice being given two months previous to such election, in some public newspaper in said territory; and in case it should happen at any time that an election for directors should not be held upon a day when pursuant to this act it ought to have been holden, the said corporation shall not on that account be dissolved, but it shall be lawful to appoint another day in such manner as shall have been prescribed by the rules and ordinances of the said corporation; and in case of the death, resignation or removal from office, of any president or director, his place may be filled up by a new election for the remainder of the year, in such manner as may be directed by the rules and ordinances of said corporation.

SEC. 4. Be it further enacted, That if any share-holder shall fail to pay any instalment in one month after the same becomes due, two months notice having been given as aforesaid, such share or shares shall be publickly sold under such rules and regulations, as the said president and directors shall provide; and the money arising from such sale, shall first be appropriated to the payment of the sum due the said corporation, and the excess, if any, shall be paid to the delinquent; and in case such share or shares shall sell for less than the amount due the corporation, the deficiency shall be recovered from such delinquent share-holder by suit.

SEC. 5. Be it further enacted, That the president and directors shall have power and authority to cut any canal from the Mississippi to or near the said town of America, on the river Ohio, and erect such locks, and otherwise improve, as to them shall seem advisable and necessary, to complete the objects of the said corporation; and the said president and directors may carry on the said canal from place to place, and from time to time as they may think proper; and may build such wharves as they may deem expedient; and the president and

directors for the time being, shall have power and authority to establish the rate of tolls, which shall not exceed twenty-five cents per ton, for each and every ton which the boat or vessel passing through the canal shall measure; and for every boat or vessel, not exceeding six tons, one hundred and fifty cents; for every forty cubic feet of timber, plank or lumber of any description, there may be charged a toll of twenty-five cents; the rate of wharfage, shall not exceed five cents per ton, for each ton which the boat or vessel liable to wharfage shall measure, for any time not exceeding five days; and the said president and directors for the time being, are hereby authorised to declare an equal dividend semi-annually arising from the nett proceeds of the profits accruing to the said corporation, after deducting the expenses of repairs and contingent charges, to which the said corporation have been subject.

SEC. 6. Be it further enacted, That the directors or a major part of them, whenever they may deem it proper may call a meeting of the stock-holders to consult or decide upon measures of importance, touching the concerns of said corporation, and such matter or measure shall be decided upon by a plurality of votes.

SEC. 7. Be it further enacted, That no transfer of stock shall be valid or effectual, until such transfer shall be entered or registered, in a book or books to be kept for that purpose by the directors.

SEC. 8. Be it further enacted, That the bills obligatory and of credit, under the seal of said corporation, which shall be made to any person whatever, shall be assignable by endorsement thereupon, under the hand of such person or his assignee, so as absolutely to transfer and vest the property thereof in such assignee; and to enable such assignee to bring and maintain an action thereupon in his own name; and all bills or notes which may be issued by order of said corporation, for the payment of money to any person whatever, or his order or to bearer, though not under the seal of the said corporation, shall be binding and obligatory upon the said corporation, in like manner and with like force and effect, as upon any private person, if made by him, and shall be assignable and negotiable in like manner, as if made by such private person.

SEC. 9. Be it further enacted, That if the said corporation should not have the fee simple property in the land through which the aforesaid canal shall be cut, the president and directors aforesaid, shall and may make application to any court of record in the county

where such land may lie, for a writ of ad quad damnum, having first given ten days previous notice to the proprietor or proprietors of such land, if he or they are to be found in the county, if not, then to his agent, if any he hath in the county; or if no agent is to be found in the county, then it shall be the duty of said president and directors, to give public notice at the door of the court house of the proper county, for two terms successively, that such application will be made, and when notice shall be given as aforesaid, the court shall thereupon order the clerk to issue such writ, directed to the sheriff of the county, commanding him to summon twelve good and lawful men, to meet on the land proposed to be occupied by the said corporation, for the purpose of cutting a canal and erecting locks as aforesaid, on a day certain to be named in the writ, of which due notice shall be given by the said sheriff to said proprietor or proprietors, or his or their agent or attorney, if to be found within the county; and if the jury so summoned shall be charged and sworn by the sheriff, who is hereby empowered to administer such oath, impartially and to the best of their judgment to view the land, proposed to be cut for said canal, having due regard therein to the interest of both parties, and to appraise the same according to its true value; and the inquest so found, made and sealed by the said jurors, together with the writ shall be returned by the said sheriff to the next succeeding term of the court, from whence such writ was issued; and the said court shall thereupon order a summons to be issued to such proprietor or proprietors, his or their agent, if to be found within the county, to shew cause if any there be, why said applicants should not be permitted to cut said canal through his, or their land, and if good and sufficient cause shall not be shewn to the contrary, the said court are hereby empowered to permit the said president and directors to cut said canal through the land of such proprietor or proprietors, upon their paying to him, her or them, the full amount of damages found by said jury; but if any damage should accrue to any person or persons in consequence of cutting said canals, or erecting such locks which was not foreseen and estimated by such jury, the person so injured shall not be debarred his right of action for the same.

SEC. 10. Be it further enacted, That the said canal shall be so far completed on or before the first day of January one thousand eight hundred and thirty, as to admit of the passage of boats or vessels of twenty tons burthen.

SEC. 11. Be it further enacted, That it shall and may be lawful at any and at all times, for the legislature of this territory, or the legislature of the state, whenever a state government shall be formed, to appoint a committee to examine into the state and condition of the concerns, property and management of the said corporation; and such legislature may alter at any time, the rates of toll and wharfage, and after the year one thousand eight hundred and fifty, the whole of the profits arising from the tolls and wharfage, shall be given to the territory or state, when a state government shall be formed, to be by such state or territory appropriated to its own use, beyond which time, the corporation shall not continue, without the consent of the legislature.

SEC. 12. Be it further enacted, That after the first elections of the president and directors, as aforesaid, all the business of the said corporation shall be transacted at the town of America, and not elsewhere.

SEC. 13. Be it further enacted, That if the aforesaid canal or canals, shall not be so far completed as to admit of the passage of boats or vessels of twenty tons burthen, from the Ohio to the Mississippi, on or before the year one thousand eight hundred and thirty, it shall be lawful for the legislature of the territory, or the state to be formed out of the same, to dissolve the incorporation hereby granted.

SEC. 14. The total amount of debts which the said corporation shall at any time owe, whether by bill, bond, note or other contract, shall not exceed twice the amount of their capital stock, actually paid for, together with the monies actually deposited with said corporation, for safe keeping; and in case of excess, the directors under whose administration it shall happen, shall be liable for the same in their natural and private capacities, and an action of debt may be brought against them or any of them, or any of their heirs, executors or administrators, in any court competent to try the same, or either of them, by any creditor or creditors of said corporation. But this provision shall not be construed to exempt the said corporation, or the lands, tenements, goods and chattles of the same from being liable for, and chargeable with the said excess. Such of the said directors as may have been absent when the said excess was contracted or created, who may have dissented from the resolution or act whereby it was contracted or created, may respectively exonerate themselves from being so liable by forthwith giving notice of the fact, and of their

absence, or dissent, at a general meeting of the stockholders, which they shall have power to call for that purpose.

SEC. 15. Be it further enacted, That the said corporation shall not at any time suspend or refuse payment in gold and silver of any of its notes, bills or obligations, nor of any monies received upon deposit by said corporation; and if the said corporation shall at any time neglect or refuse to pay on demand any bill, note or obligation, according to the contract, promise or undertaking therein expressed, or shall neglect or refuse to pay on demand, any monies received on deposit, to the person or persons entitled to receive the same, then, and in every such case, the holders of such note, bill or obligation, or the person or persons entitled to demand and receive the same, shall recover interest on the said bills, notes, obligations or monies, until the same shall be fully paid and satisfied, at the rate of twelve per cent. per annum, from the time of such demand, as aforesaid: *Provided also*, that the legislature of the territory, or of the state to be formed out of the same, may at any time hereafter, enact laws to enforce and regulate the recovery of the amount of the notes, bills, obligations or other debts, of which payment shall have been refused, as aforesaid, with the rate of interest above mentioned, vesting jurisdiction for this purpose in any courts, either of law or equity, within this territory.

SEC. 16. Be it further enacted, That it shall and may be lawful for the legislature, at any future period, to increase the stock of said corporation, and to take for the benefit of the territory or state to be formed out of the same, any quantity of said increased stock, not exceeding five thousand shares, with all the rights and privileges belonging to other stock-holders, and to be exercised in such manner as the legislature may direct.

SEC. 17. Be it further enacted, That this act be, and it is hereby declared to be a public act, and that the same be construed in all courts and places, benignly and favorably for all beneficial purposes therein mentioned.

GEORGE FISHER,
Speaker of the House of Representatives,
PIERRE MENARD,
President of the Legislative Council.

Approved—January 9, 1818,

NINIAN EDWARDS.

AN ACT to incorporate the Bank of Edwardsville.

WHEREAS, Benjamin Stephenson, John M'Kee, and others, by their petition to the legislature, have prayed to be incorporated for banking purposes: Therefore,

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That a Bank shall be established at Edwardsville, the capital stock whereof, shall not exceed three hundred thousand dollars, to be divided into shares of fifty dollars each; one third thereof may be subscribed for by the legislature of this territory, or state, when a state government shall be formed, which state or territory shall be entitled to such part of the dividend of the said corporation in proportion to the amount actually subscribed by such territory or state, which interest shall be divided into shares of fifty dollars each, in the same manner as individual stock is divided; and that subscriptions for constituting the said stock, shall be opened at Edwardsville, and at such other places as may be thought proper, under the superintendence of such persons as shall hereafter be appointed; which subscription shall continue open from time to time, as shall be thought best by the persons hereinafter mentioned: *Provided however*, that so soon as there shall be fifty thousand dollars subscribed for in the whole, and ten thousand thereof actually paid in, the said corporation may commence business, and issue their notes accordingly.

SEC. 2. Be it further enacted, That it shall be lawful for any person or partnership or body politic, to subscribe for such or so many shares as he, she or they may think fit. The payment of the subscriptions shall be made by the subscribers respectively, at the time of subscribing there shall be paid five dollars on each share, in gold or silver, or bank bills that will command the same; and the residue of the stock shall be paid at such times and in such instalments as the directors may order: provided, that no instalment shall exceed twenty-five per cent. on the stock subscribed for, and that at least sixty days notice shall be given in one or more newspapers of the territory: and provided also, that if any subscriber shall fail to make the second payment, at the time appointed by the directors for such payment to be made, shall forfeit the sum so by him, her or them, first paid to and for the use of the corporation.

SEC. 3. Be it further enacted, That all those who shall become subscribers to the said bank, their successors and assigns shall be, and

they are hereby enacted and made a corporation and body politic, by the name and style of "The President, Directors and Company of the Bank of Edwardsville," and shall so continue until the first day of January one thousand eight hundred and thirty eight; and by that name shall be and are hereby made able and capable in law, to have, purchase, receive, possess, enjoy and retain to them and their successors, lands, rents, tenements, hereditaments, goods, chattels and effects of what kind, nature, or quality soever, to an amount not exceeding in the whole, five hundred thousand dollars, including the capital stock aforesaid. And the same to grant, demise, alien or dispose of, to sue and be sued, to plead and be impleaded, answer and be answered, defend and be defended, in courts of record, or any other place whatever; and also to make, have and use a common seal, and the same to break, alter and renew at pleasure; and also to ordain, establish and put in execution such bye-laws, ordinances and regulations, as they shall deem necessary and convenient for the government of the said corporation, not inconsistent with the laws of the territory, or constitution, and generally to do, perform all and singular acts, matters and things, which to them it shall or may appertain to do; subject however, to the rules, regulations, limitations and provisions, hereinafter prescribed and declared.

SEC. 4. Be it further enacted, That for the well ordering of the affairs of the said corporation, there shall be nine directors, the first election for whom, shall be by the stock-holders by plurality of votes actually given on such day, as the persons appointed to superintend the subscriptions for stock, shall appoint by giving at least thirty days notice in one or more of the public newspapers of the territory; and those who shall be duly chosen at any election, shall be capable of serving as directors, by virtue of such choice, until the full end and expiration of the first Monday of January next, ensuing the time of such election, and no longer; and on the first Monday of January of each and every year thereafter, the election for directors shall be holden, and the nine directors after their first meeting after each election, shall choose one of their number as president.

SEC. 5. Be it further enacted, That in case it should happen at any time, that an election for directors should not be had upon any day when pursuant to this act it ought to have been holden, the corporation shall not for that cause be considered as dissolved, but it shall be lawful to hold an election for directors at any other day, agreeably

to such bye-laws and regulations, as may be made for the government of said corporation; and in such case the directors for the time being, shall continue to execute and discharge the several duties of directors until such an election is duly had and made, any thing in the fourth section to the contrary notwithstanding; and it is further provided, that in case of death, resignation or removal from the territory of any director or directors, the vacancy shall be filled by an election to be held by the directors for the balance of the year.

SEC. 6. Be it further enacted, That a majority of the directors for the time being, shall have the power to appoint such officers, clerks and servants under them, as shall be necessary for executing the business of the corporation; and to allow them such compensation for their services respectively as shall be reasonable; and shall be capable of exercising such other powers and authorities for the well governing and ordering of the affairs of the said corporation, as shall be prescribed, fixed and determined by the laws, regulations and ordinances of the same: *Provided always*, that a majority of the whole number of directors shall be requisite in the choice of a president and cashier.

SEC. 7. Be it further enacted, That the following rules, restrictions, limitations and provisions, shall form and be the fundamental articles of the constitution of the said corporation, to-wit: The number of votes to which the stock-holders shall be entitled in voting for directors, shall be according to the number of shares, he, she, or they may respectively hold.

II. None but a bona fide stock-holder, being a citizen of the territory, shall be a director; nor shall a director be entitled to any other emoluments than such as shall be allowed by the stock-holders at a general meeting; but the directors may make such a compensation to the president for his extraordinary attendance at the bank, as shall appear to them reasonable and just.

III. Not less than four directors shall constitute a board for the transaction of business, of whom the president shall always be one, except in case of sickness, or necessary absence; in which case, his place may be supplied by any other director, whom he by writing under his hand, may depute for that purpose.

IV. Any number of stock-holders not less than fifteen, who shall be proprietors of not less than fifty shares each, shall have power to call a general meeting of the stock-holders, for purposes relative to the institution, by giving at least thirty days notice in one or more

public newspapers of the territory, specifying in such notice the object or objects of such meeting; and may moreover appoint three of their number as a committee to examine into the state and condition of the bank, and the manner in which its affairs have been conducted: *Provided*, that no member of such committee shall be a director, president or other officer of any other bank.

V. Every cashier before he enters upon the duties of his office, shall be required to give bond with two or more securities, to the satisfaction of the directors in the sum of not less than ten thousand dollars, conditioned for his good behaviour and the faithful performance of his duty, to the said corporation; and the other officers and servants, shall also enter into bond and security, in such sum as the president and directors may prescribe. The land, tenements and hereditaments, which shall be lawful for the said corporation to hold, shall be only such as shall be requisite for its immediate accommodation, in relation to the convenient transaction of its business, and such as shall have been bona fide mortgaged to it by way of security, or conveyed to it by way of satisfaction, for debts previously contracted in the course of its dealings, or purchased upon judgments, which shall have been obtained for such debts.

VI. The total amount of debts which the said corporation shall at any time owe, whether by bond, bill, note or other contract, shall not exceed twice the amount of their capital stock actually paid over, and above the monies then actually deposited in the bank for safe keeping; and in case of excess, the directors under whose administration it shall happen, shall be liable for the same, in their natural and private capacities; and an action of debt may be brought against them, or any of them, their or any of their heirs, executors or administrators, in any court competent to try the same, or either of them by any creditor or creditors of the said corporation. But this provision shall not be construed to exempt said corporation, or the lands, tenements, goods or chattels of the same, from being liable for, and chargeable with the said excess; such of the said directors who may have been absent when the said excess was contracted or created, or who may have dissented from the resolution or act whereby it was contracted or created, may respectively exonerate themselves from being so liable by entering their protest against the same.

VII. The said corporation shall not directly or indirectly deal or trade, except in bills of exchange, gold and silver, or in the sale of

goods really and truly pledged for money lent, and not legally redeemed in due time, or of goods which shall be the proceeds of its lands; neither shall the said corporation take more than at the rate of legal interest allowed by the territory, or state formed out of the same, for or upon its loans or discounts.

VIII. The shares of the capital stock of said corporation, shall be assignable and transferable at any time, according to such rules as shall be established in that behalf, by the laws and ordinances of the same; but no stock shall be transferred, the holder thereof being indebted to the bank, until such debt be satisfied, except the president and directors shall otherwise order it.

IX. The bills obligatory and of credit, under the seal of the said corporation, which shall be made payable to any person or persons, shall be assignable by an endorsement thereupon, shall possess the like qualities as to negotiability; and the holders thereof, shall have and maintain the like actions thereon, as if such bills obligatory and of credit had been made by, or on behalf of a natural person; and all bills or notes which may be issued by order of the said corporation, signed by the president and countersigned by the principal cashier or treasurer thereof, promising the payment of money to any person or persons, his, her or their order or to bearer, though not under the seal of the said corporation, shall be binding and obligatory upon the same in like manner, and with like force and effect, as upon any person or persons if issued by him, her or them, in his, her or their private or natural capacity or capacities; and shall be assignable or negotiable in the like manner, as if they were so issued by such private person or persons, that is to say, those which shall be payable to any person or persons, his, her, or their order, shall be assignable by endorsement in like manner, and with like effect, as bills of exchange now are; and those which are payable to bearer, shall be assignable and negotiable by delivery only.

X. Half yearly dividends shall be made of so much of the profits of the bank, as shall be deemed expedient and proper; and once in every three years the directors shall lay before the stockholders at a general meeting, an exact and particular statement of the debts which shall have remained unpaid after the expiration of the original credit, for a period of treble the time of that credit, and the surplus or profit, if any, after deducting losses and dividends; if there shall be a failure in the payment of any part of any sums subscribed

to the capital of said bank, the party failing shall loose the dividend which may have accrued prior to the time of making such payments during the delay of the same.

SEC. 8. And be it further enacted, That the said corporation shall not at any time suspend or refuse payment in gold or silver, of any of its notes, bills or obligations, nor of any monies received on deposit in said bank: and if the said corporation shall at any time refuse or neglect to pay on demand, any bill, note or obligation, issued by the corporation according to the contract, promise or undertaking therein expressed; or shall neglect or refuse to pay on demand any monies received in said bank, or in its office aforesaid on deposit, to the person or persons entitled to receive the same; then and in every such a case, the holder of any such note, bill or obligation, or the person or persons entitled to demand and receive the same, shall receive interest on the said bills, notes, obligations or monies, until the same shall be fully paid and satisfied, at the rate of twelve per cent. per annum, from the time of such demand as aforesaid: *Provided*, that the legislature of this territory may at any time hereafter, enact laws to enforce and regulate the recovery of the amount of the notes, bills, obligation or other debts, of which payment shall have been refused as aforesaid, with the rate of interest above mentioned, vesting jurisdiction for that purpose in any court, either in law or equity, within this territory.

SEC. 9. Be it further enacted, That Benjamin Stephenson, James Mason, John M'Kee, Joseph Conway and Abraham Prickett, or any three of them, shall be commissioners for the purpose of receiving subscriptions, who shall have power to appoint a person to receive the money required to be paid at the time of subscribing; and the said receiver shall as soon as the directors are appointed, pay over the same into the hands of such person or persons, as the directors may direct.

SEC. 10. Be it further enacted, That the aforesaid corporation shall not be dissolved previous to the expiration of their charter, nor until their debts, contracts, notes, bills of exchange or undertaking in their corporate capacity, shall be finally and faithfully settled: *Provided also*, that after the expiration of their charter, they shall not transact business according to the true intent and meaning of this act, further than to settle and close their contracts as above provided.

This act to take effect and be in force from and after its passage thereof.

GEORGE FISHER,

Speaker of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—January 9, 1818,

NINIAN EDWARDS.

AN ACT to incorporate the City and Bank of Cairo.

WHEREAS, John G. Comyges, Thomas H. Harris, Thomas F. Herbert, Charles Slade, Shadrach Bond, Michael Jones, Warren Brown, Edward Humphreys and Charles W. Hunter, have become proprietors by purchase from the United States, of all that certain tract of land, situate between the Ohio and Mississippi rivers, and near the junction of the same; and which said tract of land is particularly known and distinguished upon a map or chart of that district of the territory of Illinois, in which the same is comprised as follows, viz.: South fractional half of section number fourteen, south fractional half of section number fifteen, fractional section number twenty-two, twenty-three and twenty-four, north fractional half of section number twenty-five, north half of section number twenty-six, and the north east fractional quarter of section number twenty-seven, in township number seventeen, south of range one west, and containing in the whole eighteen hundred acres or thereabouts. And Whereas, the said proprietors, represent that there is in their opinion, no position in the whole extent of these western states better calculated as it respects commercial advantages and local supply, for a great and important city, than that afforded by the junction of those two great highways the Mississippi and Ohio rivers. But that nature having denied to the extreme point formed by their union, a sufficient degree of elevation to protect the improvements made thereon from the ordinary inundations of the adjacent waters, such elevation is to be found only upon the tract above mentioned and described, so that improvements and property made and located thereon, may be deemed perfectly and absolutely secure from all such ordinary inundations, and liable to injury only from the concurrence of unusually high and simultaneous inundations in both of said rivers, an event which is alleged but rarely to happen, and the injurious consequences of which it is con-

sidered practicable by proper embankments, wholly and effectually and permanently to obviate. And whereas, there is no doubt but that a city erected at or as near as is practicable to the junction of the Ohio and Mississippi rivers, provided it be thus secured by sufficient embankments, or in such other way as experience may prove most efficacious for that purpose, from every such extraordinary inundation, must necessarily become a place of vast consequence to the prosperity of this growing territory, and in fact to that of the greater part of the inhabitants of these western states. And whereas, the above named proprietors are desirous of erecting such city, under the sanction and patronage of the legislature of this territory, and also of providing by law for the security and prosperity of the same; and to that end propose to appropriate the one third part of all monies arising from the sale and disposition of the lots into which the same may be surveyed, as a fund for the construction and preservation of such dykes levees, and other embankments as may be necessary to render the same perfectly secure; and also if such fund shall be deemed sufficient thereto, for the erection of public edifices, and such other improvements in the said city, as may be from time to time considered expedient and practicable, and to appropriate the other two third parts of the said purchase monies to the operation of banking. And whereas, it is considered that an act to incorporate the said proprietors and their associates, to-wit: All such persons as shall by purchase or otherwise hereafter become proprietors of the tract above mentioned and described, as a body corporate and politic, while it guarantees to all those who may become free-holders or residents within the said city, the fullest security as to their habitations and property, will at the same time concentrate the views and facilitate the operations of the said proprietors and their said associates, in rendering the said city secure from all such inundations as aforesaid, and in promoting the internal prosperity of the same: Therefore,

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That the said John G. Comyges, Thomas H. Harris, Thomas F. Herbert, Charles Slade, Shadrach Bond, Michael Jones, Warren Brown, Edward Humphreys and Charles W. Hunter, proprietors as aforesaid of the said tract of land above mentioned, and all such persons as may hereafter become proprietors by purchase or otherwise, of any portion of the same, being at the same time stock

holders in the bank, hereinafter to be provided for; and also all such persons as may become stock holders in said bank, without being proprietors of any of said lots, be and they are hereby ordained, constituted and appointed a body corporate and politic, in fact and in name, of the "President, Directors and Company of the Bank of Cairo;" and by that name they and their associates, proprietors and stock-holders as aforesaid, may for thirty years hereafter have succession, and shall be persons in law capable of suing and being sued, pleading and being impleaded, answering and being answered unto, and defending and being defended in all courts and places whatsoever, in all manner of actions, complaints and causes whatsoever, and that they and their successors, proprietors as aforesaid, may have a common seal, and may alter and change the same at their pleasure.

SEC. 2. And be it further enacted, That the said John G. Comyges and his said associates, and his and their heirs and assigns, proprietors as aforesaid, shall within the space of nine months from the passing of this act, proceed to lay off at the expense of said proprietors, upon such site in said tract as may be deemed most eligible therefor, a city to be known and distinguished by the name of Cairo; which city shall consist of not less than two thousand lots, each lot being not less than sixty-six feet wide, and one hundred and twenty feet deep, and the streets of said city to be not less than eighty feet wide, and to run as near as may be at right angles to each other.

SEC. 3. And be it further enacted, That the price of the said lots, into which the said site shall be so laid off as aforesaid, shall be fixed and limited at one hundred and fifty dollars each, and the monies arising from the sale and disposition thereof, shall be appropriated as follows, to-wit: two third parts thereof, that is to say, the sum of one hundred dollars on each and every lot shall constitute the capital stock of said bank, which capital stock shall be divided into twice as many shares as there are lots, the one half of which shares shall belong to the purchasers of said lots, in the proportion of one share to each lot, and the remaining half of the said shares shall be the property of the said John G. Comyges, and his associates aforesaid, their heirs and assigns, proprietors as aforesaid, in proportion to the interest which they may respectively hold in the same; the remaining one third part of the purchase money of said lots to constitute a fund to be exclusively appropriated to the security and improvement of said city, in manner as is hereinafter more particularly directed.

SEC. 4. And be it further enacted, That it shall be lawful for the said John G. Comyges, and his said associates, his and their heirs and assigns, proprietors as aforesaid, to nominate and appoint by themselves or by their attorneys thereto lawfully authorised, so many commissioners as they may deem necessary, for the purpose of receiving subscriptions for the purchase of the said lots upon the terms herein above stated; and it shall be the duty of such commissioners to advertise for sale so many of said lots as they shall be respectively authorised to sell, and to receive subscriptions for the same.

SEC. 5. And be it further enacted, That it shall be the duty of the said commissioners, upon any person applying to make such subscription to direct the person so applying to make a deposite to the credit of the bank of Cairo aforesaid, in the bank of the United States, or such branch thereof as there may be in the place where such commissioner shall reside; and in case there should be no such bank in said place, then in such chartered bank as may be most convenient, of one third of the purchase money of the lot or lots so applied for; and said applicant, upon producing to said commissioner the proper certificate of such deposite, shall thereupon and not otherwise, be deemed a subscriber for the same; and it shall be the duty of such subscriber to make the further deposite in the same bank and to the same credit, of the sum of one other third part of the said purchase money at the expiration of three months; and of the remaining one third part at the expiration of six months, from the time of such subscription, said deposits to be punctually made, under the penalty of forfeiting the deposite, or deposits thereto previously made.

SEC. 6. And be it further enacted, That no subscription shall be received from any person for more than ten of said lots.

SEC. 7. And be it further enacted, That as soon as five hundred lots shall have been subscribed for, a meeting to be held at Kaskaskia, shall be called by public notice to that effect, and which notice shall be given in not less than five of the newspapers printed in the United States, at least two months previous to the day of holding such meeting of all such subscribers for the purpose of electing thirteen directors, all of whom shall be subscribers as aforesaid, and stock-holders in said bank, and citizens of this territory, and who shall hold their offices for one year, from the time of such election, or until a new election shall be had and the said election shall be held and made by such of the stock-holders of said bank, as shall attend for that

purpose, either in person or by proxy, which proxies shall always be stock-holders, and all elections shall be by ballot, each share entitling its owner to a vote; and the thirteen persons who shall have the greatest number of votes shall be directors; and the said directors as soon as may be thereafter, shall proceed in like manner by ballot to elect one of their number to be their president; and whenever any vacancy shall happen among the directors, by death, resignation or removal, such vacancy shall be filled for the remainder of the year in which it shall happen by such person or persons, as the rest of the directors or a majority of them may appoint.

SEC. 8. And be it further enacted, That a new election shall be had annually thereafter, at such time and place as a majority of the directors for the time being, (which majority shall always constitute a board for the transaction of business) shall appoint.

SEC. 9. And be it further enacted, That the directors for the time being, or the major part of them shall have power to make and prescribe such bye-laws, rules and regulations as to them shall appear needful and proper, touching the management and disposition of the stock, property, estate and effects of the said corporation; the duties and conduct of the officers, clerks and servants employed therein; the election of directors, and of all such other matters as appertain to the business of a bank; and shall have power to appoint so many officers, clerks and servants for carrying on the said business, and with such salaries and allowances as to them shall seem meet: *Provided*, that such bye-laws, rules and regulations be not repugnant to the constitution and laws of the United States, nor of this territory.

SEC. 10. And be it further enacted, That the said bank shall be established and kept, and the business thereof at all times after the organization of the same, shall be transacted at such place within the town of Kaskaskia, as the president and directors may deem proper.

SEC. 11. And be it further enacted, That it shall be the duty of such president and directors as soon after their election as may be to proceed to distribute among the said subscribers so many lots as shall have been subscribed for, which distribution shall be by lottery.

SEC. 12. And be it further enacted, That as soon as such distribution shall have been made, it shall be the duty of the said president and directors, upon the receipt by them of the certificates for the

deposit of the whole of the purchase money as above mentioned, to make and execute in the name of the president, directors and company of the said bank of Cairo, to each and every such subscriber a good and sufficient deed of conveyance, with the usual covenants for such lot or lots as in said distribution may have fallen to the share of such subscriber, which deed shall be an absolute conveyance in fee simple to the said subscriber of all the right, title and interest of the present proprietors, their heirs and assigns in the same.

SEC. 13. And be it further enacted, That it shall be the duty of the said president and directors, to demand and receive of and from the cashiers of every bank, in which the deposits above mentioned shall have been made, the whole amount of monies so deposited, and thereupon and not before to commence their operations as a banking company.

SEC. 14. And be it further enacted, That the total amount of debts which the said corporation shall at any time owe whether by bond, bill, note or other contract, over and above the specie then actually deposited in the said bank, shall not exceed twice the amount of the capital stock actually paid into said bank. And in case of excess, in this respect the directors under whose administration such excess shall happen, shall be liable for the same in their separate and private capacities; but this shall not be construed to exempt the said corporation, or any estate real or personal which they may hold as a body corporate, from being also liable for and chargeable with such excess; but such of the directors who may have been absent when the said excess was contracted, or who may have dissented from the resolution, or act whereby the same was so contracted, shall not be so liable.

SEC. 15. And be it further enacted, That the lands, tenements and hereditaments, which it shall be lawful for the said corporation to hold, shall be such only as shall be requisite for its immediate accommodation in relation to the convenient transaction of its business, or such as shall have been bona fide mortgaged to it by way of security, or conveyed to it in satisfaction of debts previously contracted in the course of its dealings, or purchased at sales upon judgments which shall have been obtained upon such debts.

SEC. 16. Be it further enacted, That the bills obligatory and of credit, under the seal of the said corporation, which shall be made to any person or persons, shall be assignable by endorsement thereupon, under the hand or hands of such person or persons, his, her or their

assignee or assignees, and so as absolutely to transfer and vest the property thereof, in each or every assignee or assignees respectively, and to enable such assignee or assignees to bring or maintain an action thereupon, in his, her or their own name or names; and bills or notes, which may be issued by order of the said corporation, promising the payment of money to any person or persons, his, her or their order, or to bearer, though not under the seal of the said corporation, shall be binding and obligatory upon the same in like manner and with the like force and effect, as upon any private person or persons if issued by him, her or them, in his, her or their private or natural capacity or capacities, and shall be assignable and negotiable in like manner, as if they were so issued by such private person or persons.

SEC. 17. And be it further enacted, That it shall be the duty of the directors to make half yearly dividend^s of so much of the profits of the said bank, as to them or a majority of them shall seem advisable. And that every cashier and clerk, before he enters upon the duties of his office, shall give bond with two or more securities, to be approved by the directors for the time being, or a majority of them, in a sum not less than ten thousand dollars for such cashier, and two thousand dollars for such clerk, conditioned for the faithful discharge of their several duties.

SEC. 18. And be it further enacted, That the said corporation shall not demand or receive any greater interest, on any loan or discount, than at the rate of six per cent. per annum.

SEC. 19. And be it further enacted, That it shall be the duty of the said directors, immediately after their said election, to appoint out of their own body, a committee consisting of three of their members, who shall have the charge and management of that portion of the said purchase monies above set apart, and appropriated as a fund for the security and improvement of said city; and which fund or such portion thereof, as the said committee shall deem proper and advisable, shall be invested in stock of the said bank; the said directors being hereby authorised and required to add to their capital stock so many shares as shall be sufficient to take in the same, at the par value of said stock.

SEC. 20. And be it further enacted, That it shall also be the duty of the said directors immediately after their said election, to nominate and appoint three persons, not of their own body, but who shall be removeable at the pleasure of the said directors, and who shall

always be citizens of this territory, and residents, if competent and judicious persons, in the opinion of the said bank directors, can there be had, of the said city of Cairo, and who shall be styled "The board of security and improvement of the city of Cairo;" which board or a majority thereof, shall under the sanction of the directors of the said bank thereto first had and obtained, direct and superintend the construction and preservation of such dikes, levees and embankments, as may be necessary for the security of the said city of Cairo, and every part thereof, from all and every inundation which can possibly affect or injure the same; and the erection from time to time of such public works and improvements as the state of such fund will justify. And for the payment of such expenses as may be necessarily incurred therein, the said board is hereby authorised to draw upon the said committee; and who are hereby also directed and required to pay and disburse, the same; which drafts and payments shall always be made in such form and manner as the said bank directors, or a majority of them, may prescribe.

SEC. 21. And be it further enacted, That the said directors may increase the amount of their capital stock, as in their discretion they may see fit, by subscriptions to be had and obtained in the usual manner of obtaining such subscriptions, at the rate of fifty dollars per share: *Provided however*, that the capital stock of said bank, shall never exceed the sum of five hundred thousand dollars.

SEC. 22. The legislature of the said territory or state which may be erected out of the territory, may at any time compel the said proprietors of the town of Cairo, and those interested therein, to do all the business relative to the bank, at the said town of Cairo, and not elsewhere.

SEC. 23. Be it further enacted, That the said corporation shall not at any time suspend or refuse payment in gold and silver, of any of its notes, bills or obligations, nor of any monies received upon deposit in said bank, or in its office of discount and deposit; and if the said corporation shall at any time refuse or neglect to pay on demand, any bill, note or obligation, issued by the corporation, according to the contract, promising or undertaking therein expressed; or shall neglect or refuse to pay on demand any monies received in said bank, or in its office aforesaid, deposit to the person or persons entitled to receive the same; then and in every such case, the holder of any such note, bill or obligation, or the person or persons entitled to

demand and receive the same, shall recover interest on the said bills, notes, obligations or monies, until the same shall be fully paid and satisfied, at the rate of twelve per centum per annum, from the time of such demand as aforesaid.

SEC. 24. And be it further enacted, That this act be, and is declared to be a public act, and that the same be construed in all courts and places benignly and favorably, for every beneficial purpose therein mentioned.

GEORGE FISHER,

Speaker of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—January 9, 1818,

NINIAN EDWARDS.

AN ACT to incorporate the President, Directors and Company of the
Bank of Kaskaskia.

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That a bank shall be established at Kaskaskia, the capital stock whereof, shall not exceed three hundred thousand dollars, to be divided into shares of one hundred dollars each. And that subscriptions for constituting the said stock, shall on the first day of February next, be opened at Kaskaskia, Edwardsville, Belleville, Carmi, Palmyra, Shawnoetown and Elvira, under the superintendence of such persons, as shall be hereafter mentioned; which subscriptions shall be continued open until the whole capital stock shall have been subscribed for: *Provided however*, that so soon as there shall be fifty thousand dollars subscribed for in the whole, and ten thousand dollars actually paid in, the said corporation may commence business and issue their notes accordingly.

SEC. 2. Be it further enacted, That it shall be lawful for any person, or copartnership, body politic, to subscribe for such or so many shares, as he, she or they may think fit: *Provided however*, that not more than twenty shares shall be subscribed for in any one day, by any one person, body politic, or copartnership, for the first ten days after opening said subscriptions. The payments of the said subscriptions shall be made by the subscribers respectively, at the times and in the manner following, that is to say, at the time of subscribing there

shall be paid into the hands of the persons appointed to receive the same, the sum of ten dollars, in gold or silver, on each share subscribed for; and the residue of the stock shall be paid at such times, and in such instalments as the directors may order: *Provided*, that no instalment shall exceed twenty-five per cent. on the stock subscribed for, and that at least sixty days notice be given in one or more public newspapers, printed in this Territory: *And provided also*, that if any subscriber shall fail to make the second payment at the time appointed by the directors for such payment to be made, he, she or they shall forfeit the sum so by him, her or them first paid, to and for the use of the corporation.

SEC. 3. Be it further enacted, That all those who shall become subscribers to the said bank, their successors and assigns, shall be, and they are hereby enacted and made a corporation and body politic, by the name and style of the "President, Directors and Company of the Bank of Kaskaskia," and shall continue until the first day of January, one thousand eight hundred and thirty eight; and by that name shall be, and hereby are made, able and capable in law, to have, purchase, receive, possess, enjoy and retain to them, and their successors, lands, rents, tenements, hereditaments, goods, chattels and effects of what kind, nature or quality soever, to an amount not exceeding in the whole, eight hundred thousand dollars, including the capital stock aforesaid; and the same to grant, demise, alien or dispose of, to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record, or any other place whatsoever; and also to make, have and use a common seal, and the same to break, alter, and renew at pleasure; and also to ordain, establish and put in execution, such bye laws, ordinances and regulations, as they shall deem necessary and convenient for the government of the said corporation, not inconsistent with the laws of the Territory, or constitution; and generally to do and perform, and execute all and singular matters and things, which to them it shall or may appertain to do, subject however, to the rules, regulations, limitations and provisions, herein-after prescribed and declared.

SEC. 4. Be it further enacted, That for the well ordering of the affairs of the said corporation, there shall be twelve Directors, the first election for whom, shall be by the stock holders, by a plurality of votes actually given on such day, as the persons appointed to superintend the subscriptions for stock shall appoint, by giving at least thirty days

previous notice in all the public newspapers printed in this Territory ; and those who shall be duly chosen at any election, shall be capable of serving as Directors by virtue of such choice until the full end and expiration of one year, after the expiration of one year after the first Monday in January next, ensuing the time of such election, and no longer. And on the said Monday in January, in each and every year thereafter, the election for Directors shall be holden, and the said Directors, at the first meeting after each election, shall choose one of their number as president.

SEC. 5. Be it further enacted, That in case it should happen at any time, that an election for directors should not be holden upon any day, when pursuant to this act, it ought to have been holden, the corporation for that cause, shall not be considered as dissolved, but it shall be lawful to hold an election for directors on any other day, agreeable to such bye-laws and regulations as may be made for the government of the said corporation ; and in such case the directors for the time being, shall continue to exercise and discharge the several duties of directors, until such election is duly had and made, any thing in the fourth section to the contrary notwithstanding: *And it is further provided*, that in case of death, resignation or removal from office of any director or directors, the vacancy shall be filled by election for the balance of the year.

SEC. 6. Be it further enacted, That a majority of the directors for the time being, shall have power to appoint such officers, clerks and servants under them, as shall be necessary for executing the business of said corporation, and to allow them such compensation for their services respectively as shall be reasonable ; and shall be capable of exercising such other powers and authorities for the well governing and ordering of the affairs of the said corporation as shall be prescribed, fixed and determined by the laws, ordinances and regulations of the same.

SEC. 7. Be it further enacted, That the following rules, restrictions, limitations and provisions, shall form and be the fundamental articles of the constitution of the said corporation, to-wit: The number of votes to which the stock-holders shall be entitled in voting for directors, shall be according to the number of shares he, she or they, respectively hold, in the proportions following, that is to say, for one share and not more than two shares, one vote ; for every two shares above two, and not exceeding ten, one vote ; for every four shares above

ten and not exceeding thirty, one vote; for every six shares above thirty, and not exceeding sixty, one vote; for every eight shares above sixty, and not exceeding one hundred, one vote; for every ten shares above one hundred, one vote; and after the first election, no share or shares shall confer a right of voting which shall not have been holden three calendar months, previous to the day of election.

II. None but a bona fide stock-holder, being a resident citizen of the territory, shall be a director; nor shall a director be entitled to any other emolument than such as shall be allowed by the stock-holders at a general meeting; but the directors may make such compensation to the president for his extraordinary attendance at the bank, as shall appear to them reasonable and just.

III. Not less than four directors shall constitute a board for the transaction of business, of whom the president shall always be one, except in cases of sickness or necessary absence; in which case his place may be supplied by any other director, whom he by writing, under his hand, may depute for that purpose.

IV. Any number of stock-holders, not less than fifteen, who shall be proprietors of not less than fifty shares, shall have power to call a general meeting of the stock-holders, for purposes relative to the institution, by giving at least thirty days notice in one or more of the public newspapers of the territory, specifying in such notice the object or objects of meeting; and may moreover appoint three of their members as a committee, to examine into the state and condition of the bank, and the manner in which its affairs have been conducted: *Provided*, that no member of such committee, shall be director, president or other officer of any other bank.

V. Every Cashier before he enters upon the duties of his office, shall be required to give bond with sureties, to the satisfaction of the directors, in a sum not less than ten thousand dollars, conditioned for his good behaviour, and the faithful performance of his duties to the said corporation; and the other officers and servants shall also enter into bond and security in such sum as the president and directors may prescribe.

VI. The lands, tenements and hereditaments, which it shall be lawful for the said corporation to hold, shall be only such as shall be requisite for its immediate accommodation, in relation to the convenient transaction of its business; and such as shall have been bona fide mortgaged to it by way of security, or conveyed to it in satisfaction of

debts, previously contracted in the course of its dealings, or purchased upon judgments, which shall have been obtained for such debts.

VII. The total amount of debts, which the said corporation shall at any time owe by bond, bill, note or other contract, shall not exceed twice the amount of their capital stock actually paid over and above the monies then actually deposited in the bank for safe keeping; and in case of excess, the directors under whose administration it shall happen, shall be liable for the same, in their natural and private capacities; and an action of debt may be brought against them, or any of them, their or any of their heirs, executors or administrators, in any court competent to try the same, or either of them, by any creditor or creditors, of the said corporation; but this provision shall not be construed to exempt the said corporation, or the lands, tenements, goods or chattels of the same, from being liable for, and chargeable with the said excess.—Such of the said directors who may have been absent when the said excess was contracted or created, or who may have dissented from the resolution, or act whereby it was contracted or created, may respectively exonerate themselves from being so liable by forthwith giving notice of the fact, or of their absence or dissent, at a general meeting of the stock-holders, which they shall have power to call for that purpose.

VIII. The said corporation shall not directly or indirectly, deal or trade in any thing, except bills of exchange, gold or silver, or in the sale of goods, really and truly pledged for money lent and not legally redeemed in due time; or of goods, which shall be the produce of its lands; neither shall the said corporation take more than at the rate of six per cent. per annum, for or upon its loans or discounts.

IX. The shares of the capital stock of said corporation, shall be assignable and transferable, at any time according to such rules and regulations as shall be established in that behalf, by the laws and ordinances of the same; but no stock shall be transferred, the holder thereof, being indebted to the bank, until such debts are satisfied, except the president and directors shall otherwise order it.

X. The bills obligatory and of credit, under the seal of the said corporation, which shall be made payable to any person or persons, shall be assignable by an endorsement thereupon; shall possess the like qualities as to negotiability; and the holders thereof shall have and maintain the like actions thereon, as if such bills obligatory, and of credit had been made by or on behalf of a natural person; and all bills or

notes which may be issued by order of the said corporation, signed by the president and countersigned by the principal cashier or treasurer thereof, promising the payment of money to any person or persons, his, her or their order, or to bearer, though not under the seal of the said corporation, shall be binding and obligatory upon the same, in like manner and with like force and effect as upon any private person or persons, if issued by him, her or them, in his, her or their private capacity or capacities; and shall be assignable and negotiable in the like manner, as if they were so issued, by such private person or persons, that is to say, those which shall be payable to any person or persons, his, her or their order, shall be assignable by endorsement in like manner and with like effect as bills of exchange now are; and those which are payable to bearer, shall be assignable and negotiable by delivery only.

XI. Half yearly dividends, shall be made of so much of the profits of the bank, as shall be deemed expedient and proper; and once in three years the directors shall lay before the stock-holders, at a general meeting, an exact and particular statement of the debts which shall have remained unpaid, after the expiration of the original credit, for a period of treble the time of that credit, and the surplus of profit, if any, after deducting losses and dividends. If there shall be a failure, in the payment of any part of any sums subscribed to the capital of said bank, the party failing shall loose the dividend which may have accrued, prior to the time of making such payment, during the delay of the same.

SEC. 8. Be it further enacted, That the said corporation shall not at any time suspend or refuse payment in gold and silver, of any of its notes, bills or obligations, nor of any monies received upon deposite in said bank, or in its office of discount and deposite; and if the said corporation shall at any time refuse or neglect to pay on demand, any bill, note or obligation, issued by the corporation according to the contract, promise or undertaking therein expressed, or shall neglect or refuse to pay on demand any monies received in said bank, or in its office aforesaid on deposite to the person or persons entitled to receive the same; then and in every such case the holder of any such note, bill or obligation, or the person or persons entitled to receive the same, shall recover interest on the said bills, obligations, or monies, until the same shall be fully paid and satisfied, at the rate of twelve per centum per annum from the time of such demand as aforesaid.

SEC. 9. Be it further enacted, That the following persons, to-wit: Pierre Menard, William Morrison, senr. Shadrach Bond, William C. Greenup and Hugh H. Maxwell, at Kaskaskia; Benjamin Stephenson, James Mason, Abraham Prickett, John M'Kee and Joseph Conway, at Edwardsville; R. K. M'Laughlin, William Mears, William Kinney, John Messenger, and Doctor Heath, at Belleville; Daniel Hay, James Graham, James Ratliffe, James Gray, and John Kraw, at Carmi; Thomas Sloo, Joseph M. Street, M. S. Davenport, James Wilson, and John Caldwell, at Shawnoetown; Doctor Woolverton, G. W. Smith, Samuel Marshall, Jesse B. Brown, and Seth Gard, at Palymra; James Finny, Erwin Morris, Owen Evans, George Evans, and Jacob Littleton, at Elvira; or any three of them at each place, shall be commissioners for the purpose of receiving subscriptions, and who shall have power to appoint a person to receive the money, required to be paid at the time of subscribing: and the said receiver, shall as soon as the directors are appointed, pay over the same into the hands of such person as the directors may direct.

SEC. 10. Be it further enacted, That the said corporation shall not be dissolved, until their debts, contracts, notes, bills of exchange and undertakings, in their corporate capacity shall be finally and faithfully settled: *Provided also*, that after the expiration of their charter, they shall not transact business, according to the true intent and meaning of this act, further than to settle and close their contracts, as above provided; and that the territory or state which may be formed out of the same, shall have the right of subscribing for one third of the capital stock of the said bank of Kaskaskia; and the said third part shall be subject to such regulation as the stock of individuals is subject to; and to such other regulations as the legislature may from time to time make and ordain, touching the same.

This act to take effect from and after the passage thereof.

GEORGE FISHER,
Speaker of the House of Representatives.

PIERRE MENARD,
President of the Legislative Council.

Approved—January 9, 1818,
NINIAN EDWARDS.

AN ACT *establishing Circuit Courts and Justices' Courts,
and for other purposes.*

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That there shall be, and there is hereby established in each and every county now established, or which may hereafter be established in this territory, a Court to be styled "the Justices' Court," which shall be composed of the justices of the peace of the respective counties, any three of whom shall constitute a court, or quorum to do business.

SEC. 2. Be it further enacted, That the said courts shall respectively hold three terms annually, at the place appointed for holding courts in their respective counties, as follows, to-wit: In the counties of Crawford and Madison, on the first Mondays of April, August and December; in the counties of St. Clair and Franklin, on the second Mondays of April, August and December; in the counties of Monroe and Pope, on the third Mondays of April, August and December; in the counties of Randolph and Union, on the first Mondays of March, July and November; in the counties of Jackson and Washington, on the second Monday of March, July and November; in the counties of Johnson and Bond, on the third Mondays of March, July and November; in the counties of Gallatin, White and Edwards, on the fourth Mondays of March, July and November.

SEC. 3. Be it further enacted, That there shall be appointed and commissioned by the governor, some competent person in each county, who shall be clerk of the justices' court of the county in which he shall be appointed, who shall hold his office at the place where such county court may be held; and the said clerk shall give bond with one or more sureties to be approved of by the court of which he is clerk, to the governor for the time being and his successors in office, in the sum of five hundred dollars, and take an oath faithfully to discharge the duties of his office, and seasonable to record the decrees, judgments and orders of the court of which he is clerk; and to do and perform all other duties required, or which shall be required of him by law; and deliver all the records and other writings belonging to his said office, whole, safe and undefaced, to his successor in office, which oath shall be endorsed on the back of said bond, and filed in the office of the secretary of the territory; provided, that no person holding the

office of justice of the peace shall be appointed clerk of any justices' court.

SEC. 4. Be it further enacted, That the said justices' courts shall have the same powers, and possess the same jurisdiction, which the county courts now possess and exercise in all cases relating to public roads and highways, in cases relating to the county taxes, in all cases relating to elections, and all other cases relating to the concerns of the county.

SEC. 5. And be it further enacted, That this territory shall be divided into two circuits, for each of which there shall be appointed and commissioned by the governor, one person learned in the law, who shall have resided in the territory at least one year previous to his appointment as circuit judge, with a salary of one thousand dollars, to be paid quarter yearly out of the territorial treasury; who previous to entering on the duties of his office, shall take an oath to support the constitution of the United States, and an oath of office according to law. The said circuit judge shall hold three terms annually of the said circuit court, in each and every county within his district, and shall have jurisdiction over all causes, matters and things, arising at common law or in chancery, in the respective counties, except in cases where the debt or demand shall be under twenty dollars, in which case he shall have no original jurisdiction; and the said circuit judges, in their circuits respectively, shall have and exercise all and every of the powers, authority and jurisdiction which were or might have been had and exercised by the United States' judges, appointed for this territory in their circuits respectively, previous to the passage of this law; and the circuit courts established by this act, shall have and exercise all the powers and jurisdiction, which previous to the passage of this act, were or might have been exercised by the circuit courts heretofore existing; and the circuit courts in the respective counties, shall do and perform all the duties, and exercise all the jurisdiction heretofore done, performed and exercised by the county courts, except in such cases, the jurisdiction whereof is by this law given to the justices' courts.

SEC. 6. Be it further enacted, That the circuits established by this act, shall be called the Eastern and Western Circuits, and shall be formed as follows, to-wit: the counties of Crawford, Edwards, White, Gallatin, Pope, Johnson and Franklin, shall compose the eastern circuit: The counties of Bond, Madison, St. Clair, Washington,

Monroe, Randolph, Jackson and Union, shall compose the western circuit; and the said courts hereby established shall be holden at the following times and places, to-wit: in the counties of Bond and Crawford on the first Mondays of March, July and November; in the counties of Washington and Edwards, on the second Mondays of March, July and November; in the counties of Madison and White, on the third Mondays of March, July and November; in the counties of St. Clair and Gallatin, on the fourth Mondays of March, July and November; in the counties of Monroe and Pope, on the first Mondays of April, August and December; in the counties of Randolph and Franklin on the second Mondays of April, August and December; in the county of Jackson, on the first Mondays of May, September and January; in the county of Union, on the second Mondays of May, September and January; in the county of Johnson, on the third Mondays of May, September and January.

SEC. 7. Be it further enacted, That in case either of the said circuit judges shall by death or other unavoidable absence be unable to attend his circuit courts, or any term thereof, it shall be the duty of the other circuit judge to attend in his place, and hold such court or courts, and exercise the jurisdiction which the absent judge might have legally done until the vacancy shall be filled by the governor, where the same shall have happened by death. It shall be the duty of the said circuit judges to reside in the circuits for which they shall be appointed: *Provided*, that no person appointed under this law a circuit judge, shall be at liberty to practice law in this territory: *Provided further*, that it shall be the duty of the circuit judges appointed by virtue of this act, to go jointly into their respective circuits. In case any person appointed under this law a circuit judge shall have been a practising attorney in any circuit to which he has been appointed a judge, until the causes in which such judge shall have been concerned shall be determined and in case any judge shall be interested in any cause in his circuit, it shall be his duty to make out a list of such case or cases and file the same in the clerk's office of the court where the cause may be pending; and it shall be the duty of the clerk of the circuit court where such judge is interested, a reasonable time before the term the cause is set for trial to give to the other circuit judge notice thereof; and it shall be the duty of the other circuit judge, to attend such circuit for the trial of said cause; and if both judges shall happen to be, or to have been interested or

concerned in any cause or causes, they shall order and direct the same to be certified to the general court hereinafter mentioned to be decided on; and it is hereby made the duty of the general court to try said cause in the same manner that the circuit court could legally have done.

SEC. 8. Be it further enacted, That the judges of the circuit courts hereby established, shall hold their offices during good behaviour, and during the continuance of the territorial government.

SEC. 9. Be it further enacted, That there shall be appointed and commissioned by the governor in each county a competent person as clerk of the said circuit court, who shall give bond and security in the same manner that the clerks of the circuit courts heretofore existing were required to do.

SEC. 10. Be it further enacted, That it shall be the duty of the several clerks of the circuit courts and county courts heretofore existing, on the application of the clerks of the circuit courts and justices' courts, hereby established for the respective counties to deliver up to them respectively, the whole of the records, papers and writings, which may appertain to their respective offices, according to the jurisdiction of the courts of which they are clerks; and according to the true intent and meaning of this act, whole and undefaced, under the penalty of forfeiting and paying to the use of the county, in which such person shall have been clerk, the sum of one thousand dollars, to be recovered by action of debt, for the use of the county; and the clerks of the circuit courts and the justices' courts, appointed by virtue of this act, shall respectively receive the same fees and compensation heretofore allowed the clerks of the circuit courts and county courts heretofore existing for the performance of like services.

SEC. 11. Be it further enacted, That all suits, process, motions and causes whatsoever they may be, either civil or criminal, which are now commenced or pending in the several circuit courts and county courts heretofore existing, shall be returnable to have day, and be disposed of and be decided upon by the circuit courts hereby established in the counties where such suits, process, motions and causes may have been commenced, and are pending at the taking effect of this act, and in all cases where judgment or decrees may have been given by the circuit courts or county courts heretofore existing, which remain unsatisfied or unperformed, it shall be the duty of the clerks of the circuit courts hereby established respectively to issue execu-

tions on all such judgments, or decrees, and also upon replevy bonds, returnable in the same manner as though no change of courts had taken place, other than a mere change of terms, and all cases which are at issue or standing for trial in the circuit courts or county courts heretofore existing, shall stand and come on for trial at the first term of the courts hereby established, in the same manner that they would have done in the respective courts in which they were pending, had this law not been passed.

SEC. 12. Be it further enacted, That the judges appointed by the authority of the United States, for this territory, shall constitute a general court of Illinois territory, and the said judges of the general court shall hold four terms of said court annually; two to be held in Shawnoetown, on the fourth Mondays of June and October, in each and every year; and two to be held in Kaskaskia, on the second Mondays of June and October, in each and every year. And the said general court shall have appellate jurisdiction.

SEC. 13. Be it further enacted, That appeals shall be allowed to the said general courts, and writs of error shall be allowed according to the principles of the common law, and conformably to the laws and usages of this territory, from the said general court; and the said writs of error may be prosecuted for the reversal of the judgments and decrees of the said circuit courts, as well in criminal as other cases: *Provided however*, that all appeals from the judgments or decrees of the circuit courts for the eastern district, shall be prosecuted and determined in the general court to be held as aforesaid at Shawnoetown; and all appeals from the judgments or decrees of the circuit courts for the western district, shall be prosecuted and determined in the general court to be held as aforesaid at Kaskaskia.

SEC. 14. Be it further enacted, That there shall be two competent persons appointed by the said general court or a majority of the judges thereof, as clerks of the said general courts, one to reside at Shawnoetown and the other at Kaskaskia, who shall respectively give bond with two sureties at least, to be approved of by the judges of the general court, or a majority of them, to the governor of the territory and his successor in office for the time being, in the sum of two thousand dollars, conditioned to seasonably record all decrees, judgments and orders of the courts of which they are clerks, and to do and perform all other duties required, or which shall be required of them by law, and to deliver up the records and other writings belonging to

their said offices respectively, whole, safe and undefaced, to his successors in office; and said clerks shall moreover take the same oath that the clerks of the circuit courts are by this law required to take; and such oath shall be endorsed upon the back of the bond, and returned to the office of the secretary of the territory.

SEC. 15. Be it further enacted, That it shall be the duty of the clerk of the court of appeals for Illinois territory, on the application of the clerk of the general court at Kaskaskia, to deliver up to him the whole of the records, papers and writings which may appertain to his office according to the true intent and meaning of this act, whole and undefaced, under the penalty of forfeiting and paying to the use of the territory the sum of fifteen hundred dollars, to be recovered by action of debt, in the name of the governor, for the use of the territory, before the circuit court for the county of Randolph.

SEC. 16. Be it further enacted, That in all suits and causes, which now are, or which at the taking effect of this act, may be pending in the court of appeals for the Illinois territory, the parties or their attorney, shall be permitted to take all such measures for bringing them to a final termination and decision in the general court, to be held at Kaskaskia, that might have been taken in the said court of appeals, had no change taken place; and the said general court to be held as aforesaid at Kaskaskia, shall as far as practicable, proceed to a final determination of such causes, in the same manner that the said court of appeals might legally have done, had no other change than a mere alteration of the terms taken place; and it shall be the duty of the clerk of the general court to issue executions on all judgments and decrees, and replevy bonds, which remain in said court of appeals unsatisfied, returnable according to law.

SEC. 17. Be it further enacted, That appeals may be prayed and writs of error taken out upon matters of law only, in all cases wherein they are now allowed by law; and all writs of error shall be issued by the clerk of the general court, and be made returnable to the ensuing term of the general court at Shawnoetown, provided the proceedings or judgment complained of, were had or determined in the eastern circuit; but in case the proceedings or judgment were had or determined in the western circuit, the clerk shall make it returnable to the next term of the general court to be held at Kaskaskia, provided that no appeal or writ of error shall be decided without the concurrence of two judges at least.

SEC. 18. Be it further enacted, That the judicial term of the circuit courts in each county shall consist of six days, during which time the said courts shall sit, unless the business before them shall be sooner disposed of:—*Provided however*, that the general court at each term shall sit until all the business shall be disposed of.

SEC. 19. Be it further enacted, That the county courts, circuit courts and courts of appeals, heretofore existing, shall be and the same are hereby abolished.

This act to take effect and be in force from and after its passage.

GEORGE FISHER,

Speaker of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—January 12, 1818,

NINIAN EDWARDS.

AN ACT *making appropriations for the year' eighteen hundred and eighteen, and for other purposes.*

Be it enacted by the Legislative Council and House of Representatives of the Illinois territory, and it is hereby enacted by the authority of the same, That there shall be paid out of the Territorial treasury, on the warrant of the Auditor of Public Accounts, to each member of the Legislative Council and House of Representatives, the sum of three dollars per day, for each day's attendance at the present session of the legislature, and at the rate of three dollars for every twenty miles travel to and from the seat of government to their residence, by the most usual road. To the secretary of the Legislative Council, and clerk of the House of Representatives, for their services at the present session, the sum of four dollars per day, for every day's attendance at the present session; and the engrossing and enrolling clerk, the sum of four dollars per day; and to the door-keeper of both houses, three dollars per day, for each day's attendance at the present session.

SEC. 2. Be it further enacted, That the compensation which may be due to the members and officers of the legislative council, shall be certified by the secretary thereof, and the secretary's by the president thereof. And that which may be due to the members of the house of representatives, including the enrolling clerk and door-keeper, by the clerk thereof, and the clerk's by the speaker thereof; which certificate shall be sufficient evidence to the Auditor of the claim, and he

shall issue a warrant or warrants to the person or persons so entitled on the Territorial treasury, for the amount of his certificate; which warrant as well as all other warrants, shall draw interest until paid at the treasury.

SEC. 3. Be it further enacted, That the following shall continue for one year commencing on the first day of January one thousand eight hundred and eighteen, to be the salaries of certain officers, as follows, to-wit: To the Auditor of Public Accounts, the sum of three hundred dollars; to the Territorial treasurer, the sum of two hundred and fifty dollars.

SEC. 4. And be it further enacted, That there shall be paid out of the Territorial treasury to the following persons, to-wit: To E. K. Kane, for his services for furnishing the printers with a copy of the laws of the last session of the legislature, and superintending the printing of the same, the sum of sixty-five dollars: to John W. Gillis, the sum of two dollars per day, for each day the legislature set in his house at this session: to Thos. Vance and Jacob Fisher, for wood at the present session, thirty-six dollars: to Edward Cowles, for stationary and pitchers, fifteen dollars and eighty-eight cents; to Berry & Blackwell, for printing a memorial to congress praying for a state government, five dollars: to E. C. Berry, Auditor of Public Accounts, for books, stationary and book case for his office, fifty-one dollars and fifty cents: to John Thomas, for sundries furnished the engrossing and enrolling clerk, seven dollars and twenty-five cents: to Edward N. Cullom, for two day's attendance before he could be qualified to take his seat as a member, six dollars: to George Fisher and William H. Bradsby, three dollars each, for their attendance on the first day of the session; the house having adjourned at an early hour, before their arrival.

GEORGE FISHER,

Speaker of the House of Representatives.

PIERRE MENARD,

President of the Legislative Council.

Approved—January 9, 1818,

NINIAN EDWARDS.

RESOLUTIONS.

RESOLVED by the Legislative Council and House of Representatives, That John Thomas be appointed to furnish a copy of the laws of the present session, to the printers, for which, he shall upon the completion thereof receive the sum of three dollars per day for each day necessarily employed in doing the same; for which he shall make out and render an account to the Auditor, whereupon he shall issue his warrant for the amount.

RESOLVED, That so soon as the Public Printers Messrs. Berry and Blackwell, shall procure a certificate from the Secretary of the territory, of the completion of the printing of the laws and journals of the present session of the legislature, it shall be the duty of the Auditor of public accounts, to issue a warrant to said Berry & Blackwell, for the amount to which they shall be entitled according to their several contracts for printing the same; and it shall be the duty of the Public Printers, to ascertain from the Secretary of the territory, the number of journals to which each county may be entitled according to the population of the said counties, as may to him appear just from the last returns in his office, and forward the same to the clerks of the county courts respectively, to be by them distributed in the best manner for public information; for which service compensation shall be made at the next session of the legislature.

RESOLVED, That the public printers be required to print and deliver to the secretary of the territory, six hundred copies of the laws of the present session of the legislature; and the secretary of the territory is hereby authorised to distribute the laws to the several counties, and to employ such person as may be necessary to convey them to the clerks of the several county courts; for which, compensation shall be made at the next session of the legislature.

GEORGE FISHER,
Speaker of the House of Representatives.

PIERRE MENARD,
President of the Legislative Council.

Approved—January 9, 1818

NINIAN EDWARDS.

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